IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-435

IMPERIAL IRRIGATION DISTRICT, ET AL., *Petitioners*,

v.

BEN YELLEN, ET AL., *Respondents*.

BRIEF OF PETITIONER IMPERIAL IRRIGATION DISTRICT

Of Counsel:

CHARLES E. CORKER
4128 55th Avenue, N.E.
Seattle, Washington
98105
(206) 523-9264

REGINALD L. KNOX, JR.
HORTON, KNOX, CARTER
& FOOTE
Law Building, Suite 101
895 Broadway
El Centro, California
92243
(714) 352-2821

NORTHCUTT ELY
FREDERICK H. RITTS
ROBERT F. PIETROWSKI, JR.
WILLIAM H. BURCHETTE
RALPH J. GILLIS
LAW OFFICES OF
NORTHCUTT ELY
Watergate 600 Building
Washington, D.C. 20037
(202) 342-0800

Attorneys for Imperial Irrigation District

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OPINIONS BELOW

The principal opinion of the Court of Appeals is reported at 559 F.2d 509 (9th Cir. 1977), and appears at App. 1a.[1] The opinion of the Court of Appeals modifying its principal opinion and denying the District's petition for rehearing is reported at 595 F.2d 524 (9th Cir. 1979), and appears at App. 64a. The opinion of the District Court (Turrentine, District Judge) is reported at 322 F. Supp. 11 (S.D. Cal. 1971), and is printed at App. 78a. The order of the District Court

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[1] In this brief, "App." is used to designate the appendix to Imperial Irrigation District's Petition for Certiorari. References to the Consolidated Appendix are indicated "Con. Apx."

denying the motion of respondents Ben Yellen, et al., for leave to intervene after judgment to prosecute an appeal is unreported and is reproduced at App. 112a. The decision of the Court of Appeals reversing that order of the District Court is an appendix to the opinion of the Court of Appeals, 559 F.2d, at 543, and appears at App. 62a.

JURISDICTION

The judgment of the Court of Appeals was entered August 18, 1977, and was subsequently modified by an order entered April 23, 1979, which denied Imperial Irrigation District's petition for rehearing. The jurisdiction of the Supreme Court was invoked under § 1254(1) of the Judicial Code, 62 Stat. 928, by a petition for certiorari filed September 14, 1979. Certiorari was granted December 3, 1979.

STATUTORY PROVISIONS INVOLVED

Relevant extracts from the statutes and compact involved are printed in the Appendix to Imperial Irrigation District's Petition for Certiorari beginning at page 155a. They are:

Boulder Canyon Project Act, 45 Stat. 1057, §§ 1, 4(a), 4(b), 5, 6, 8, 9, 12, 13, 14 and 18, 43 U.S.C. §§ 617, c(a), c(b), d, e, g, h, k, *l*, m, and q. (App. 155a.)

Colorado River Compact, 70 Cong. Rec. 324 (1922), Art. VIII. (App. 168a.)

Act to Provide for the Application of the Reclamation Law to Irrigation Districts, 42 Stat. 541, § 1, 43 U.S.C. § 511. (App. 169a.)

Colorado River Basin Project Act, 82 Stat. 886, § 301(b), 43 U.S.C. § 1521(b). (App. 171a.)

Reclamation Act of 1902, 32 Stat. 388, §§ 3, 5, and 8, 43 U.S.C. §§ 372, 383, 392, 416, 431, 434, and 439. (App. 172a.)

Omnibus Adjustment Act of 1926, 44 Stat. 649, *as amended*, 70 Stat. 524, § 46, 43 U.S.C. § 423(e). (App. 174a.)

Judicial Code, 62 Stat. 689, § 1738, 28 U.S.C. § 1738. (App. 176a.)

QUESTIONS PRESENTED

1. Whether the Boulder Canyon Project Act and this Court's opinion and decrees in *Arizona* v. *California* require the delivery of water in satisfaction of "present perfected rights," as defined therein, on privately owned lands in excess of 160 acres?

2. Whether principles of finality preclude the reversal of administrative and judicial determinations that vested water rights are not subject to impairment by the excess lands provisions of the reclamation law?

3. Whether an alleged "desire" to buy land at less than its market value at prices to be fixed by the Secretary of the Interior under § 46 of the Omnibus Adjustment Act of 1926 created standing to intervene and appeal from a District Court judgment against the United States from which the United States did not appeal? And, if so, whether such standing ceased, upon the termination of the Secretary's authority to fix prices for excess lands, during the pendency of the appeal?

STATEMENT OF THE CASE

The Decisions Below

This suit was instituted by the United States against Imperial Irrigation District ("the District") at the request of the Secretary of the Interior ("the Secretary") in 1967. The Secretary sought a declaratory judgment that the acreage limitation[2] provisions of the reclamation law, particularly § 46 of the Omnibus Adjustment Act of 1926, 44 Stat. 649, 46 U.S.C. § 423 (e), apply to privately owned lands in the District which receive Colorado River water through the All-American Canal. Specifically, he asked for a declaration that water should not be delivered to lands in excess of 160 acres per landowner unless and until the landowner agrees to sell the excess lands at prices approved by the Secretary.

The State of California intervened in the District Court proceedings as *parens patriae* and as owner of lands in a waterfowl reserve.

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[2] The term "acreage limitation" is a species of statutory limitation on the amount of irrigable land in single ownership that is eligible to receive project water from federal reclamation projects. Various statutes provide for acreage limitations in overlapping and sometimes inconsistent terms. These include: the Reclamation Act of 1902, §§ 3, 5, 32 Stat. 388-89 (1902), 43 U.S.C. §§ 416, 432, 434; Act of February 2, 1911, 36 Stat. 895, 43 U.S.C. § 374; Warren Act, § 2, 36 Stat. 926, 43 U.S.C. § 524; Act of July 24, 1912, 37 Stat. 200, 43 U.S.C. § 449; Act of August 9, 1912, § 3, 37 Stat. 266, 43 U.S.C. §§ 543, 544; Act of August 13, 1914, § 12, 38 Stat. 689, 43 U.S.C. § 418; Act of August 11, 1916, § 5, 39 Stat. 508, 43 U.S.C. § 627; Act of August 11, 1916, § 6, 39 Stat. 508, 43 U.S.C. § 628; Act of January 25, 1917, §§ 1-4, 39 Stat. 868; Act of May 20, 1920, 41 Stat. 605, 43 U.S.C. § 375; Omnibus Adjustment Act of May 25, 1926, 44 Stat. 649, 46 U.S.C. § 423e; and Act of October 14, 1941, 54 Stat. 1119, 16 U.S.C. § 590z-2(c)(5).

John M. Bryant and certain other landowners intervened as defendants on their own behalf and as representatives of a class comprised of all persons (some 800 in number) owning more than 160 acres of irrigable land within the District.

Ben Yellen, M.D., and the other individual respondents, intervenors after judgment, alleged a desire to buy land from the present owners at prices substantially below market values, and that they would be able to do so if the present owners were denied water from the All-American Canal unless they agreed to sell their excess lands at prices established by the Secretary.

The District Court, after trial, entered judgment against the United States, holding that the acreage limitation provisions of reclamation law have no application to privately owned lands within the District. 322 F. Supp., at 11.

Respondents applied for leave to intervene to appeal in the event the United States decided not to appeal. The District Court denied leave to intervene for this purpose. App. 112a. The United States decided not to appeal.[3] Respondents appealed the order denying leave to intervene.

In the meantime, respondents, in a separate case, obtained a District Court decision (by another judge)

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[3] Solicitor General Griswold explained:

"I considered the matter carefully and thoroughly, and over a considerable period of time. As a result of my consideration, I became convinced that (a) we would not win the case in the court of appeals, and (b) we should not win it. In this situation, I came to the conclusion that it was my duty as a responsible officer of the government not to authorize an appeal." 117 Cong. Rec. 46228 (1971).

that the "residency requirement"[4] of § 5 of the Reclamation Act of 1902 applies to lands within the District. *Yellen, et al.* v. *Hickel,* 335 F. Supp. 200 (S.D. Cal. 1971); 352 F. Supp. 1300 (S.D. Cal. 1972). In the "residency case," respondents alleged that they would be able to buy land at prices they could afford if the residency requirement of § 5 of that Act were applied. The Court of Appeals then reversed the order denying intervention in the present case (the "acreage case") on the basis that there might be two conflicting decisions in the Ninth Circuit. 559 F.2d, at 543.

The two cases ("residency" and "acreage") were calendared for argument before the same panel. Almost three and one-half years after argument, the Court of Appeals ordered dismissal of the residency case for lack of standing,[5] *id.,* at 519, but reversed the District Court's judgment in the acreage case as to both standing and the merits. *Id.,* at 523-524, 542.

The Relationship of This Case to *Arizona* v. *California*

The central issue in this case involves the conflict of the decision of the Court of Appeals below with the opinion and decrees of this Court in *Arizona* v. *California* construing the authority of the Secretary under the Boulder Canyon Project Act ("Project Act"), 45 Stat. 1057, 43 U.S.C. §§ 617 *et seq.*

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[4] "[N]o such sale [of a right to the use of water for land in private ownership] shall be made to any landowner unless he be an actual bona fide resident on such land . . . ." 32 Stat. 389, 43 U.S.C. § 431.

[5] See App. 14a-16a, and p. 77 of this brief, for the Court of Appeals' discussion of the curious history of the standing issue in the residency case.

The opinion of this Court in *Arizona* v. *California,* 373 U.S. 546 (1963), held that the Secretary is required by § 6 of the Project Act, read in conjunction with other references in that act (*e.g.,* §§ 4(a), 8, and 13) to the Colorado River Compact, to deliver water in satisfaction of "present perfected rights" pursuant to Article VIII of the Compact, which requires that such rights shall be unimpaired. "Present perfected rights" as defined by this Court in its original decree in *Arizona* v. *California,* 376 U.S. 340 (1964), are water rights perfected under state law or reserved under federal law prior to June 25, 1929—the effective date of the Project Act.

This Court has described the § 6 requirement that present perfected rights be satisfied as "one of the most significant limitations" on the Secretary's discretion to deliver water under authority of the Project Act. 373 U.S., at 585.[6]

This Court's supplemental decree in *Arizona* v. *California,* 439 U.S. 419 (1979), which adjudicated the magnitudes and priority dates of present perfected rights in Arizona, California, and Nevada, requires the Secretary to deliver to the District the lesser of (i) 2,600,000 acre-feet of annual diversions or (ii) the amount of water required to irrigate 424,145 acres, with a priority date of 1901—these being the District's "present perfected rights" established by actual use of water in that quantity on that area of land prior to the effective date of the Project Act.

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[6] The opinion contains ten references to the Act's protection of present perfected rights, at pages 566, 567, 581, 582 n. 83, 584 (two references), 585, 588, 594, 600.

On the other hand, the Court of Appeals' opinion would require the Secretary and the District to withhold delivery of water from some 60 percent of the decreed area, 233,000 acres,[7] characterized as "excess lands" (areas in excess of 160 acres per owner), unless the owner agrees to sell those lands at prices to be fixed by the Secretary. It is conceded by the Court of Appeals that owners cannot be compelled to sell.

Thus, the Court of Appeals' opinion, if given effect, would stop the delivery of water to some 233,000 acres that were being irrigated from the Colorado River, without federal assistance, more than a half century ago (and in some cases three quarters of a century ago), long before there was a Boulder Canyon Project, unless their owners agree to sell them at prices to be fixed by the Secretary at less than their value.

As the Court of Appeals' opinion on rehearing candidly put it, "Those who own excess lands will be required to sell the excess at below-market prices, or will no longer receive water for irrigating those lands," notwithstanding that "it is also clear from the record in this case that land in the Imperial Valley has long been devoted to agricultural use, that the entire economy of the Valley is based on agriculture and agricultural support industries, that the particular 233,000 acres involved constitutes some of the finest agricultural land in the world, and that federal irrigation facilities provide the only assured source of water in the Valley."[8] 595 F.2d, at 528.

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[7] This figure appears in the Court of Appeals' opinions, 559 F.2d, at 522, 595 F.2d, at 528, 530 n. 6.

[8] Federal irrigation facilities became "the only assured source of water in the valley" under the Project Act which, in § 6, as-

Land Speculation

If water should be denied to the present owners of these lands, speculators would be the newly enriched beneficiaries of the decision. The principal respondent, Dr. Yellen, is on record with an affidavit in which he says that if the government were to prevail in this action he and persons similarly situated anticipate being able to purchase land worth $1200 to $1500 per acre (as of 1971) for $25 to $50 per acre. App. 245a. Thus, Dr. Yellen, *et al.*, if they prevail in this suit, will be able to use § 46, which was intended by Congress to prevent speculation, to achieve windfall profits. The Department of the Interior has conceded as much. In proposed regulations published some 10 years after this litigation commenced, the Department stated its intention to reverse "the current practice of allowing an excess land purchaser to realize the windfall profits represented by low-priced federal water in an immediate resale."[9] App. 219a. Unfortunately, however, these regulations, if ever enacted, would not prevent Dr. Yellen, *et al.*, from reaping windfall profits because they limit price controls on resale only until one-half of the project's costs are repaid—an event which has already occurred with respect to the All-American Canal, by the efforts of the landowners who, according to the Court of Appeals, remain subject to the Secretary's power to fix prices notwithstanding that repayment.

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sured the satisfaction of the preproject water rights of these same lands. See p. 25, *infra*.

[9] The proposed regulations were published August 22, 1977, but the date for receipt of comments has been postponed to the end of 1980, with the expectation of putting them into effect in July 1981, nearly four years after initial publication. It is not certain that the regulations will ever be promulgated in the form proposed, or at all.

Historical Background: The origin of Imperial Irrigation District's present perfected rights

At the outset we wish to dispel any notion that this case involves rights to use "low-priced federal water." The water rights at stake here are not—and never have been—owned by the federal government. The District's present perfected rights came into existence without federal assistance, financial or otherwise, by the efforts of pioneer settlers who succeeded, despite enormous hardships, in converting one of the world's most inhospitable deserts into one of its most productive agricultural areas.[10]

The following is a condensation of the narrative given in the opinion of District Judge Turrentine:[11]

> "The initial appropriations and diversions of water from the Colorado River were made by the California Development Company, a privately owned corporation organized in 1896 and the predecessor in interest of defendant District, which was organized in July of 1911. These appropria-

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[10] All of the lands in the decreed area of 424,145 acres in Imperial Valley were acquired from the United States prior to or soon after the turn of the century, by entry under the Desert Land Act, 43 U.S.C. §§ 321 *et seq.*, or other homestead laws, 43 U.S.C. §§ 161 *et seq.* All of these laws required the applicant to have lived on these desert lands for a specified period of years. The Desert Land Act required proof of acquisition of a water right under state law by bona fide prior appropriations. The history of the homestead laws, in relation to federal laws concerning irrigation, is summarized in *California* v. *United States*, 438 U.S. 645, 655-663 (1979).

[11] See also *Arizona* v. *California*, 373 U.S. 546, 552-553. The historical material on the development of Imperial Valley, and on the Colorado River Compact and the Project Act, is voluminous. It is cited and summarized in *The Hoover Dam Documents, House Document No. 717*, 80th Cong., 2d Sess., at 1-31 (1948). The evolution of the Project Act in the four successive Swing-Johnson bills is traced there at 32-59.

tions and diversions laid the foundation for the present perfected water rights which have admittedly existed within the boundaries of the District from and after June 25, 1929, the effective date of the Boulder Canyon Project Act.

"The first water from the Colorado River was diverted and brought to the Valley in July of 1901. This water, which was diverted about one mile north of the international boundary with Mexico, was carried by the Alamo Canal through Mexican territory and back into the United States at Imperial Valley to avoid the high mesa and sandhill country north of the international boundary. For most of its 50 mile course in Mexico, this canal made use of an ancient overflow channel known as the Alamo River, which formerly led into the Salton Sea.

* * * * *

"By 1903, through the distributive facilities constructed by the local mutual water companies, approximately 25,000 acres of valley lands were in irrigated cultivation, all as a result of diversions from the River. By the following winter, the irrigated acreage was increased to 100,000. 181,191 acres were irrigated by 1910, 308,009 in 1916, 413,-440 in 1919, and 424, 145 in 1929, the year when the Boulder Canyon Project Act took effect.

* * * * *

"At the time of the taking effect of said Project Act, the District had a distribution and drainage system which was wholly financed, constructed, maintained and operated by local means. The distribution system then, as of June 25, 1929, comprised approximately 1,700 miles of main and lateral canals, providing for the irrigation by waters diverted by it from the Colorado River of approximately 424,000 privately owned acres, computed on a single cropping basis. All of this acreage was, as of June 25, 1929, being irrigated by

and with Colorado River water, carried through the Alamo Canal. In 1966, just prior to the bringing of this action, there were approximately 438,000 acres irrigated with water transported through the All-American Canal." 322 F.Supp., at 12-14.

The Colorado River Compact

On November 24, 1922, the Colorado River Compact, an interstate agreement relating to allocations and rights in the waters of the River, was signed by commissioners representing the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, and by Herbert Hoover, as representative of the United States. It became effective June 25, 1929.[12]

Under the Compact, quantities of consumptive use were apportioned in perpetuity to the Upper Basin and the Lower Basin. The four upper States (Colorado, New Mexico, Utah, and Wyoming), in return, agreed not to deplete the flow of the river at a division point (Lee Ferry, Arizona) below stated aggregates in ten-year periods, and both groups agreed to share the burden of any future treaty with Mexico. The protection of prior vested rights was dealt with in Article VIII, which provided:

> "Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. . . ." [13]

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[12] The Colorado River Compact was authorized by an Act of Congress dated August 19, 1921, 42 Stat. 171, and by the acts of the legislatures of the participating states. Congress approved it in § 13 of the Project Act, 43 U.S.C. § 617*l*. *See also*, § 4(a) thereof.

[13] The full text of Article VIII appears at App. 168a.

The Boulder Canyon Project Act

The Project Act was signed by President Coolidge on December 21, 1928.[14] It was the last of the four "Swing-Johnson" bills, considered in as many Congresses. The Act *inter alia* (i) in §§ 4(a) and 8 gave consent to the Colorado River Compact, and in §§ 8 and 13 subjected the United States and those claiming under it to that compact; (ii) in § 1 authorized construction of a storage dam (now named Hoover Dam) and power plant, mandating in § 6 that the dam and reservoir be used "[f]irst, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power"; (iii) directed in § 5 that no one should have the use of the stored water except by contract with the Secretary; and (iv) in § 1 authorized the construction of the All-American Canal.

Section 14 declared the Act to be deemed a supplement to the reclamation law, "which said reclamation law shall govern the construction, operation, and management of the works herein authorized, *except as otherwise herein provided* (emphasis added)." The Act in § 9 contained a specific acreage limitation, but

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[14] It did not become effective until June 25, 1929, in consequence of delays of the States in meeting the requirements of § 4(a) for their ratification of the Colorado River Compact as a seven-state agreement, or, in the alternative, as a six-state agreement (in the event that Arizona refused to ratify), accompanied, in the latter event, by the enactment by California of an act limiting her rights to water, including "present perfected rights and all other rights which may now exist," to specified quantities. The accomplishment of the latter alternative was proclaimed by President Hoover on June 25, 1929.

that limitation in explicit terms applied only to public lands that the Secretary might open to entry (there are no public lands open to entry in the District).

The exception to the reclamation law provided for in § 14 reflected the innovative character of the Project Act. This was the first great multiple-purpose project. The Project Act differed from all previous water resource project authorizations in almost every respect. The Boulder Canyon Project was to be financed from the general treasury, not the Reclamation Fund.[15] The amount authorized to be appropriated in § 2(b), $165,000,000, was in excess of the combined total of all previous reclamation projects. In lieu of the Reclamation Fund, a new fund in the Treasury, the Colorado River Dam Fund, was created in § 2(a), into which all federal appropriations, and all future revenues, were to be paid, and out of which all disbursements were to be made. Disposition of the revenues of this fund bore no relation to the disposition of revenues of the Reclamation Fund.

The Secretary was required by § 4(b) of the Project Act to have in hand contracts assuring the repayment of the whole federal investment, plus operation and maintenance, before any money could be appropriated. In this respect, the Project Act differed drastically from the Omnibus Adjustment Act, enacted two years earlier, which only required that reclamation project

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[15] The Reclamation Fund, created by § 1 of the 1902 Reclamation Act, 32 Stat. 388, 43 U.S.C. § 391, is a fund into which certain federal revenues from the western states, *e.g.*, certain proceeds from the sale of public lands, oil and mineral royalties from public lands, etc., are paid. Initially, all appropriations for reclamation projects were made out of this fund, and the aggregate amount of such appropriations was limited to the fund's income.

repayment contracts be in hand before commencement of delivery of water, *not* before construction. As to flood control (usually a non-reimbursable item), while an allocation of $25,000,000 was made to this function, this amount was required by § 2(b) to be repaid out of revenues in excess of those required for amortization of the investment in the dam and power plant.

Contracts for storage and delivery of water under § 5 were to be "for permanent service," whereas similar contracts under the reclamation law are for a fixed period.

The All-American Canal Contract and the Hewes Decision

The contract between the United States and the District combines in one document the functions of a water storage contract, pursuant to § 5 of the Project Act, and a repayment contract, pursuant to § 4(b).

Negotiation of the contract providing for the construction of the All-American Canal commenced in 1930. During this negotiation, the District took the position that it would not contract with the United States for construction of the All-American Canal and repayment of the costs thereof if delivery of water from the canal would be limited to any maximum acreage in single ownership. Thus, while an early draft of the contract would have limited deliveries of water to 160 acres per landowner, the contract as finally executed contained no acreage limitation provision as to privately owned lands.

Following signature of the contract and approval by the District's electors, the District instituted an in rem proceeding, *Hewes* v. *All Persons,* in the Superior Court of California to validate the contract as required

by 43 U.S.C. § 511, by state law, and by Article 31 of the contract. One of the defendants in the validation proceedings, an owner of more than 160 acres named Charles Malan, filed an answer attacking the validity of the contract on the ground that it would make the acreage limitation provisions of the reclamation law applicable to deliveries of water from the All-American Canal, and would thereby deprive him of the right to receive water for his lands in excess of 160 acres. In response to Malan's claim, Secretary Wilbur, who signed the 1932 contract on behalf of the United States, issued a letter-ruling that the acreage limitation provisions of the reclamation law were not applicable to privately owned lands in the District. App. 213a. On July 5, 1933, following the Secretary's ruling, judgment was entered in the *Hewes* case confirming the legality of the contract. App. 150a. In reaching its ultimate holding that the contract was valid, the court held that neither the contract nor any applicable law required that water deliveries to private lands within the District be limited to any maximum acreage held in single ownership.

Construction of the All-American Canal commenced on August 8, 1934, with funds allocated by Secretary Harold L. Ickes, who was also Public Works Administrator. The first official delivery of water through the canal to the District occurred on October 13, 1940. The District's entire supply of irrigation water has been transported by the Canal since March of 1942.

From 1933 until 1964, the Department of the Interior consistently adhered to Secretary Wilbur's ruling that the 160-acre limitation did not apply to privately

owned lands in the District.[16] During this period, Congress was kept advised of the fact that the 160-acre limitation was not being applied in the District. Yet Congress appropriated large amounts for construction of the project each year from 1936 through 1950. Moreover, Congress on three occasions has amended or supplemented the Project Act, and on none of these occasions did it insert an acreage limitation provision in the Act.

On December 31, 1964, Frank J. Barry, then Solicitor of the Department of the Interior, issued an opinion that purported to reverse Secretary Wilbur's ruling of 1933. Con. Apx. 182a. Barry's opinion reasoned that the 160-acre limitation of the reclamation law was applicable to the District because § 14 of the Project Act incorporates the reclamation law.

Subsequent to the Barry opinion, the Department of the Interior for several months attempted to negotiate a new contract with the District which would have incorporated the 160-acre limitation. When the District refused to negotiate a new contract, insisting on its rights under the existing contract, the United States brought this action for declaratory relief.

SUMMARY OF ARGUMENT

I

The opinion in *Arizona* v. *California* construed the Project Act as excluding water rights perfected under state law prior to the effective date of that Act from the powers vested in the Secretary to allocate the use

[16] The District Court noted that the Wilbur ruling had been adhered to by six subsequent Secretaries in four Presidential administrations. 322 F.Supp. at 26, n.30.

of water stored by Hoover Dam. Indeed, it said that the Act "fettered" his powers in that respect. 373 U.S., at 581. It read the Act as requiring the delivery of stored water to satisfy those rights, saying:

> "One of the most significant limitations in the Act is that the Secretary is required to satisfy present perfected rights, a matter of intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective." *Id.*, at 584.

The Court's 1979 decree recognized the fact that, prior to the authorization of the Boulder Canyon Project, pioneer settlers in the Imperial Valley in the period 1901-1929 had succeeded in diverting 2,600,000 acre feet of water annually from the Colorado River to irrigate 424,145 acres, by means of the privately owned Alamo Canal. All of the lands involved in this controversy are part of that 424,145 acres.

But if the opinion of the Court of Appeals is given effect, notwithstanding the opinion and decrees of this Court in *Arizona* v. *California,* the Secretary will deliver much less than the decreed quantity of 2,600,000 acre feet annually, to irrigate much less than the decreed area of 424,145 acres. This is because (if the court's figures are right) 233,000 acres of the decreed area will be ineligible to receive water unless the owners thereof agree to sell the excess lands at less than market value at prices fixed by the Secretary. The Court of Appeals concedes that the Secretary cannot compel them to sell, but thinks that some will do so.

The Court of Appeals argues that the District, not the landowners, owns the decreed present perfected rights, and, therefore, the District can "redistribute"

the water that is taken away from excess lands. This contention is quite untenable, both factually and legally. The fact is that all lawfully irrigable land in the District is now receiving water. There is no place within the District to put the water withheld from excess lands. Moreover, as a matter of California law, the District is merely the trustee of water rights for the landowners, who are the beneficial owners, and their beneficial interest is a constitutionally protected property right which is appurtenant to the land irrigated. Section 6 directs that these rights be satisfied; there is no authority for taking them. As a matter of federal law, § 8 of the Reclamation Act of 1902 stipulates that rights to use of water supplied through federal works shall be appurtenant to the land irrigated, and § 13(d) of the Project Act prescribes that the "covenants" in § 13(c) (which subject all rights of the United States and water users to the Colorado River compact) shall "run with the land." This includes, by definition, the Compact term "present perfected rights," as adopted by the Project Act.

The Court of Appeals' holding hinges entirely on § 14 of the Project Act, which provides that the Act shall be deemed a supplement to the reclamation law, "which said reclamation laws shall govern the construction, operation, and management of the works herein authorized, *except as otherwise herein provided* (emphasis added)." The Court ignored the exception. The specific requirement of § 6, which mandates the satisfaction of present perfected rights, controls the general reference to the reclamation law in § 14. The only land limitation appearing in the Project Act is in § 9, which is specifically limited to desert public lands. The legislative history of the Proj-

ect Act shows six efforts, at a time when the § 14 language was in the bill, to impose acreage limitations on private lands, even though previously irrigated. All of these efforts were eventually unsuccessful. And if § 14, standing alone, imported into the Project Act the acreage limitation provisions of the reclamation law, of course the proposed restrictions, as well as § 9, which imposed acreage limitations on public lands opened for entry, would have been surplusage. Moreover, the legislative history does not contain a single statement to the effect that § 14 authorizes acreage limitations.

The District Court, in construing the relative effect to be given §§ 6 and 14 of the Project Act, gave primacy to § 6. It said:

> "Under the decree in Arizona v. California construing the Project Act, the application of a specific quantity of water to a defined area of land is an essential element of a perfected right. It was held in the court's opinion that the Secretary is required to satisfy present perfected rights. This duty of the Secretary to supply water to an area where present perfected rights exist is repugnant to the concept that the United States may at the same time shut off water deliveries destined for lands, be they excess or not, entitled to the beneficial use of Colorado River water in the exercise of these rights (footnote omitted). 322 F.Supp., at 18.
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> * * * * *
>
> "The combined effect of §§ 6, 8(a) and 13 of the Project Act is to express Congressional intent that the present perfected rights be protected from interference by any contrary provision of the Project Act or reclamation law. The specific and repeated guarantees found in these sections

> indicate that any provision such as acreage limitation which would curtail such rights would be detailed in correspondingly exact language. Neither the references to reclamation law contained in §§ 1, 4(b), 12 and 14 of the Project Act, nor any other term thereof demonstrate Congressional intention that acreage limitation[s] apply to privately owned lands in the District." 322 F.Supp. at 18-19.

In holding that the Project Act authorizes acreage limitations, the Court of Appeals relied heavily on this Court's opinion in *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275 (1958), which held that acreage limitations were required by the various acts authorizing the Central Valley Project in California. The Court of Appeals' reliance on *Ivanhoe,* as though that case were authority for the curtailment of present perfected rights by subsequent imposition of acreage limitations, is misplaced in four essential respects: (i) *Ivanhoe* did not involve the Project Act; (ii) the landowners in *Ivanhoe* did not have vested water rights; (iii) in *Ivanhoe* the statute did not require the satisfaction of vested or perfected rights; and (iv) in *Ivanhoe* the district and the Secretary agreed that acreage limitations applied and the contract so provided, whereas here the District and the Secretary agreed that acreage limitations did not apply, and the contract did not contain an acreage limitation provision. Moreover, the dictum in *Ivanhoe,* relied on by the Court of Appeals in this case, to the effect that the operation of § 8 of the Reclamation Act of 1902 is limited to the acquisition of water rights and does not extend to operation of the dam, was recently disavowed by this Court in *California* v. *United States,* 438 U.S. 645, 674-75 (1979).

II

Principles of finality require that the decision not to apply acreage limitations to the District be recognized as irreversible.

Article VIII of the Compact and the Project Act required the Secretary to make a number of decisions in carrying out the intent of Congress. Among others, he relocated Hoover Dam to Black Canyon rather than Boulder Canyon, and he determined that the acreage limitations should not apply within the District. Hoover Dam will remain in Black Canyon and acreage limitations should not now apply in the District.

Every available legal device was used to make these decisions final for all time.

The regulations of the Department of the Interior, in force since 1910, permitted water to pass through works constructed by the United States to satisfy vested rights for ownership in excess of 160 acres. Those regulations are still in effect.

The Secretary contracted with the District in an attempt to make clear what the rights and obligations of the parties were. The contract was for permanent service as required by the Project Act and the parties agreed that the contract did not require an acreage limitation.

The Court of Appeals' decision failed to give full faith and credit, required by 16 U.S.C. § 1738, to a 1933 judgment of a State court of competent jurisdiction, in proceedings required by 43 U.S.C. § 511, to validate the contract between the United States and the District, whereby the United States agreed to deliver water through the All-American Canal, and the District agreed to repay the cost of that canal. The

contract required this validation proceeding, repeating the language of 43 U.S.C. § 511. The State Court, deciding pleaded adversary issues, held that neither the Project Act nor the contract required acreage limitations on private lands in Imperial Valley, and that the contract was valid. The Department acquiesced in the judgment, and submitted the contract to Congress as conforming to § 4(b) of the Project Act, which required assurance of the repayment of the government's investment, as a precondition to the appropriation of funds for construction. The appropriations were made.

The validation decree, after it became final, was thus accepted by the Secretary and by Congress as the trigger to proceed with and finalize the project.

For more than 30 years the District relied on the repeated and explicit understanding that acreage limitations did not apply within its boundaries.

III

The Court of Appeals' opinions would extend the concept of standing on an unjustifiable scale. This is not a class action. There is no allegation of an injury to a particular respondent, as distinguished from the public in general, caused by any party to this action, which a judgment in this suit could redress. Respondents do not allege, and could not allege, any preference against other potential purchasers of excess lands dwelling anywhere in the United States. Even if the Secretary should be held to possess the power to refuse delivery of water to excess lands possessing present perfected rights unless and until the owners

authorize him to sell those lands at below-market prices fixed by the Secretary, there is no assurance at all that any landowner, if he decided to sell at the Secretary's price, would choose to sell to these particular respondents. The Secretary cannot compel landowners to sell, and cannot choose the buyers if sales are made. Dr. Yellen, *et al.*, are merely members of the general public, seeking to second-guess the Solicitor General of the United States in his perception of the merits of the case, after he had withdrawn the United States from it.

This action was brought under § 46 of the Omnibus Adjustment Act of 1926, which provides that "*until one-half the construction charges against said lands shall have been fully paid* no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior . . . (emphasis added)."

The event which terminated the Secretary's authority occurred on March 1, 1978, when the District completed repayment of more than one-half of the construction charges against all lands in the District. App. 243a. The Court of Appeals, in its opinion on rehearing, acknowledged the occurrence of this event but held that the Secretary's authority continues "regardless of the fact that construction charges for the irrigation project have been repaid."[17] 595 F.2d, at 527. The only authority cited by the court for this statement was its own decision in *United States* v. *Tulare Lake Canal Company,* 535 F.2d 1093, *cert. denied* 429 U.S.

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[17] To the contrary, the proposed regulations published by the Department on August 22, 1977, construe § 46 of the 1926 Act as only requiring price approval until one-half of the total construction costs allocated to irrigation have been paid. § 426.9, App. 236a; § 426.10, App. 237a.

1121 (1977). It went on to say "[t]his decision expressly applies to all federal reclamation projects subject to Section 46." *Ibid.* The holding in the present case is in flat contradiction of the statute. To the extent that the holding by the Court of Appeals in the *Tulare* case supports its holding here, we respectfully suggest that the *Tulare* decision should be disavowed by the Supreme Court.

ARGUMENT

I.

The Boulder Canyon Project Act Does Not Authorize Acreage Limitations On Present Perfected Rights

A. The plain language of the Project Act specifically requires the satisfaction of present perfected rights

1. *The § 6 Requirement That Present Perfected Rights Be Satisfied*

Section 6 of the Project Act expressly requires that the Boulder Canyon Project be operated so as to satisfy "present perfected rights":

> "The dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power."

As will be shown, this explicit provision, as construed in *Arizona* v. *California,* cannot be given effect if the Project Act is construed to imply authority to limit water deliveries on private lands in the District to 160 acres per landowner.

The term "present perfected rights" is not defined in the Project Act, but has been defined by this Court as follows:

> "(G) 'Perfected right' means a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use;
>
> "(H) 'Present perfected rights' means perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act . . . ." *Arizona* v. *California,* 376 U.S. 340, 341 (decree) (1964).

The concept of "present perfected rights" had its origins in Article VIII of the Colorado River Compact:

> "Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.
>
> "All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate."

Although the Article VIII requirement that present perfected rights not be impaired applies to all seven of the Basin States, Article VIII was drafted specifically to protect landowners in Imperial Valley. Delph

Carpenter, one of the authors of the Compact, testified as follows:

> "During the deliberations of the Colorado River Commission in Santa Fe, and after 10 days' work, a sketch or outline of the progress was released to the press, stating what had happened and the proposed terms of a treaty. . . . The Imperial Valley representatives were immediately responsive. They came before the Commission and presented their claims with great vigor. . . .
>
> "In view of that claim, coming as it did from people who cultivated upward of half a million acres of very valuable land, Article VIII of the Compact was drawn at the last session of the proceedings." *Hearings Pursuant to S. Res. 320,* Sen. Comm. on Irr. & Recl., 68th Cong., 2d Sess., at p. 678 (1925).

The term "present perfected rights" appears in both the Project Act (§ 6) and the Colorado River Basin Project Act (§ 301(b)), 82 Stat. 886, 43 U.S.C. §§ 1501 *et seq.*, where it is used to limit the Secretary's discretion to allocate waters between states and to deliver waters within individual states. And it appears in this Court's opinion and decrees in *Arizona* v. *California,* which construed the Project Act's allocation of mainstream water among the three Lower States (Arizona, California and Nevada) and adjudicated present perfected rights within those states.[18] Expressed in terms of acre-feet of diversions[19] annually, present perfected

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[18] 373 U.S. 546 (opinion) (1963); 376 U.S. 340 (decree) (1964); 439 U.S. 419 (supplemental decree) (1979).

[19] For purposes of illustrating the magnitude of the present perfected rights decreed in the Lower Basin states, we have shown

rights in the Lower States as decreed by this Court are as follows:

Arizona	1,059,565
California	2,99 4,451
Nevada	13,034

The importance of the District's present perfected rights to the scheme of the Compact and the Project Act is evident from their magnitude: 2,600,000 acre-feet of diversions annually—64 percent of the total present perfected rights decreed by this Court, and 59 percent of the 4,400,000 acre-feet of consumptive use apportioned to California of the first 7,500,000 acre-feet available.

The requirement of the Project Act that present perfected rights be satisfied is not limited to interbasin or even interstate allocations; it extends to intrastate deliveries of water from the Boulder Canyon Project. Thus, this Court in *Arizona* v. *California* decreed 2,600,000 acre-feet of annual diversions, not to the Lower Basin and not to California, but to the District. Section 13(d) of the Project Act, in providing that conditions and covenants subjecting water deliveries to the Compact shall be for the benefit of the states "and the users of water therein," in effect requires that the rights assured by the Compact, including present perfected rights, attach to intrastate deliveries of water. In *Arizona* v. *California,* this Court, in four separate places in its opinion and original decree, con-

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these rights only in terms of acre-feet of diversions. For the alternative expressions of the decreed rights (*i.e.*, quantities of water necessary to irrigate stated amounts of acreage), where applicable, the Court is referred to its decrees at 376 U.S. 340 (1964) and 439 U.S. 419 (1979).

firmed that the § 6 requirement that present perfected rights be satisfied applies to such intrastate deliveries. In its opinion, the Court said:

> ". . . Congress intended the Secretary of the Interior, through his § 5 contracts, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States *and to decide which users within each State would get water.*[20]
>
> . . . Significantly, no phrase or provision indicating that the Secretary's contract power was to be controlled by the law of prior appropriation was substituted either then or at any other time before passage of the Act, *and we are persuaded that had Congress intended so to fetter the Secretary's discretion, it would have done so in clear and unequivocal terms, as it did in recognizing 'present perfected rights' in § 6.*
>
> * * * * *
>
> "The argument that Congress would not have delegated to the Secretary so much power to apportion and distribute the water overlooks the ways in which his power is limited and channeled by standards in the Project Act. . . . *One of the most significant limitations in the Act is that the Secretary is required to satisfy present perfected rights,* a matter of intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective. § 6.
>
> * * * * *
>
> ". . . It will be time enough for the Courts to intervene when and if the Secretary, in making apportionments *or contracts,* deviates from the stand-

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[20] Our footnote: the disavowal of the foregoing dictum in *California* v. *United States,* 438 U.S. 645, 674 (1978), reinforces the argument that Congress did not authorize the Secretary to impair rights previously perfected under state law by prohibiting delivery of water to areas theretofore served under those rights.

> ards Congress has set for him to follow, *including his obligation to respect 'present perfected rights'* as of the date the Act was passed (emphasis added)." 373 U.S., at 580-581, 583-584, 594.

The Court made the point again in its 1964 decree:

> "If insufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use of 7,500,000 acre-feet in the aforesaid three States, then the Secretary of the Interior, *after providing for satisfaction of present perfected rights in the order of their priority dates without regard to state lines* . . . may apportion the amount remaining . . . (emphasis added)." 376 U.S., at 342.

In other words, the Secretary's authority under § 5 of the Project Act to determine which users within each state shall get water and to contract with such users is limited by the § 6 requirement that present perfected rights within each state be satisfied.

2. *The Incompatibility of § 6 and Acreage Limitations*

While § 9 of the Project Act expressly limits entries on *public* lands (on which there are no present perfected rights) to 160 acres, the Act makes no mention whatever of acreage limitations with respect to *private* lands. For this, there is good reason: the Secretary could not possibly satisfy present perfected rights as required by § 6 if he were required to limit deliveries of the water subject to such rights to 160 acres per landowner, because most of the District's present perfected rights were perfected on—and have always been used on—excess lands, to which such rights are appurtenant.

Although there is no specific provision in the Project Act which requires the application of acreage limitations to private lands, the Court of Appeals inferred such a requirement from § 14 which provides:

> "This act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided."

Since the "reclamation law" includes § 5 of the Reclamation Act of 1902 and § 46 of the Omnibus Adjustment Act of 1926—both of which contain acreage limitation provisions—the Court of Appeals reasoned that § 14 of the Project Act by implication requires that deliveries of water to private lands be limited to 160 acres per landowner. The court reconciled this reasoning with the explicit § 6 requirement that present perfected rights be satisfied on the ground that the District, rather than the landowners, is the owner of the present perfected rights. From this premise, the court concluded that the Secretary could satisfy § 6 by delivering all of the water subject to the District's present perfected rights to the District, and that the District could then withhold water from excess lands and redistribute it to non-excess lands without impairing present perfected rights. 559 F.2d, at 529-30. This conclusion is wrong for reasons both practical and legal.

First, as to the practical impossibility of what the Court of Appeals has proposed: there is simply no place within the District to put the water which the Court of Appeals would have the District withhold from excess lands and redistribute. All lawfully irri-

gable private land—some 438,000 acres—is already under irrigation (424,145 acres of this is in decreed present perfected rights). Thus, as a practical matter, it is physically impossible to redistribute water within the District.

Second, as to the legal impossibility of redistributing water subject to present perfected rights: by definition, a present perfected right is a right "acquired in accordance with state law . . . by the actual diversion of a specific quantity of water that has been applied to a defined area of land . . ." prior to the effective date of the Project Act.[21] Thus, the attributes of present perfected rights are defined by state law and are identical to the attributes of other perfected appropriative water rights in the particular state except that the right must have existed as of June 25, 1929, and is recognized only to the extent that water had been put to use by that date. Under California law, (i) the landowners within an irrigation district are the equitable owners of the water rights—including present perfected rights—held by the district, and have a constitutionally protected interest therein, and (ii) water rights—including present perfected rights—are appur-

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[21] The significance of state law is confirmed by § 18 of the Project Act which provides:

> "*Sec. 18.* [*Rights of States to waters within their borders.*] —Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement."

For the relation of this section to present perfected rights, see the opinion in *Arizona* v. *California*, 373 U.S., at 588. Section 18 was reenacted in 1940 as § 14 of the Boulder Canyon Project Adjustment Act, 54 Stat. 779, 43 U.S.C. § 618m.

tenant to the land on which the water is used. Both of these aspects of a present perfected right would necessarily be impaired if the Secretary or the District were to withhold water subject to such rights from excess lands within the District's boundaries.

First, as to the ownership aspect of a present perfected right: California law as articulated by the California Supreme Court is to the effect that the district holds the rights in trust for the landowners:

> "[T]he beneficiaries of the trust, who, upon familiar equitable principles, are to be regarded as the owners of the property, are the landowners in the district, with whose funds the property has been acquired (Civ. Code, § 853), and in whom, indeed, is vested by the express provisions of the statute, in each, the right to the several use of a definite proportion of the water of the district, and in all, in common, the equitable ownership of its water rights, reservoirs, ditches, and property generally, as the means of supplying water. St. 1887, pp. 34, 35, §§ 11, 13. Such rights as these cannot be distinguished in any way from other private rights, and therefore clearly come within the protection of the provision of section 13 of article 1 of the state Constitution—that 'no person shall be . . . deprived of . . . property without due process of law,' and of the similar provision of section 1 of the fourteenth amendment to the Constitution of the United States." *Merchants' National Bank of San Diego* v. *Escondido Irrigation District,* 144 Cal. 329, 334, 77 P. 937, 939 (1904).

Thus, the equitable ownership of the present perfected rights which the Secretary must satisfy under § 6 of the Act is vested in the landowners, not in the District. And the landowner consequently has a statu-

tory right to use a definite, proportional share of the water distributed by the district:

> "*Basis of apportionment among landowners.* All water distributed by districts for irrigation purposes shall except when otherwise provided in this article be apportioned ratably to each landowner upon the basis of the ratio which the last assessment against his land for district purposes bears to the whole sum assessed in the district for district purposes." Cal. Water Code Ann. § 22250 (West 1971).

This right may be assigned, not by the District, but by the individual landowner:

> "*Assignment of right.* Any landowner may assign for use within the district his right to the whole or any portion of the water apportioned to him pursuant to Section 22250." *Id.*, at § 22251.

Second, the present perfected right is appurtenant to the land on which the water is used. As Hutchins has written:

> "The concept of appurtenance of an appropriative right to the land on or in connection with which the water is used received early acceptance in California." 1 W. Hutchins, Water Rights in the Nineteen Western States 454 (1971).

The concept of appurtenance is enshrined in the California Civil Code [22] and has been confirmed by Cali-

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[22] The California Civil Code provides:

> "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air, or heat from or across the land of another." Cal. Civ. Code, § 662.

fornia courts on a number of occasions. *See, e.g., Palmer* v. *Railroad Commission,* 167 Cal. 163, 173, 138 P. 997, 1001 (1914); *Stanislaus Water Co.* v. *Bachman,* 152 Cal. 716, 724, 93 P. 858, 862 (1908); *Senior* v. *Anderson,* 138 Cal. 716, 723, 72 P. 349, 351 (1903).

The concept of appurtenance is also found in the Project Act. Section 13(d) in effect provides that rights assured by the Colorado River Compact (such as present perfected rights) "run with the land," and "shall be deemed to be for the benefit of and be available to" the states of the Basin and "the users of the water therein . . . by way of suit, defense, or otherwise, in any litigation respecting the waters of the Colorado River . . . ." [23] And § 14, which incorporates the reclamation law "except as otherwise herein provided," presumably incorporates § 8 of the Reclamation Act of 1902, which provides:

> "[T]he right to the use of water . . . shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."

Mr. Justice Harlan called attention to this, dissenting in *Arizona* v. *California,* 373 U.S. 546, 623 (1963).

It is true that, under California law, an appropriative water right may be severed from the land. *See, e.g., Wright* v. *Best,* 19 Cal.2d 368, 380, 121 P.2d 702, 709 (1942). However, this Court, in *Ickes* v. *Fox,* 300 U.S. 82 (1937), rejected the notion that an appropriative right may be severed by the trustee rather than the equitable owner. In *Ickes,* the United States was the appropriator and legal owner of the water right, as the

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[23] This provision was re-enacted in the Boulder Canyon Project Adjustment Act, 54 Stat. 779, § 14.

District is here. The United States diverted, stored and distributed the water for use by others, just as the District does here. Nevertheless, this Court held that the water rights were appurtenant to the land and were enforceable by the landowner, not the trustee. *See, on remand, Ickes* v. *Fox,* 137 F.2d 30 (D.C. Cir. 1943).

From all this it follows that, if water is withheld from excess lands in the District, as required by the Court of Appeals' decision, the equitable owners of present perfected rights will be denied the use of the water subject to those rights, as will the lands to which the rights are appurtenant. A more obvious impairment of present perfected rights, violating Article VIII of the Compact—and a more obvious failure to satisfy such rights, violating § 6 of the Project Act—is difficult to imagine.

Judge Turrentine put it this way:

> "This duty of the Secretary to supply water to an area where present perfected rights exist is repugnant to the concept that the United States may at the same time shut off water deliveries destined for lands, be they excess or not, entitled to the beneficial use of Colorado River water in the exercise of these rights." 322 F.Supp., at 18.

Since it is apparent that the Secretary cannot satisfy present perfected rights *and* impose acreage limitations within the District, the plain language of § 14 —"except as otherwise herein provided"—must mean that the acreage limitation provisions of the reclamation law are not incorporated by § 14. This interpretation finds support in the well-settled rule of statutory construction that:

> "An interpretation of the statute which would . . . render different sections inconsistent with each

> other, cannot be the true one." *Perrine* v. *Chesapeake & D. Canal Co.*, 50 U.S. [9 How.] 172, 187 (1850).

Also, because § 6 is a specific provision, and § 14 is a general provision, a construction which in effect makes § 14 override § 6 violates the related rule that:

> "[S]pecial provisions prevail over general ones which, in the absence of the special provisions, would control." *Missouri* v. *Ross*, 299 U.S. 72, 76 (1936).

In holding that the Project Act authorizes acreage limitations, the Court of Appeals relied heavily on this Court's opinion in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958), which held that acreage limitations were required by the various acts authorizing the Central Valley Project in California. The Court of Appeals' reliance on *Ivanhoe*, as though that case were authority for the curtailment of present perfected rights by subsequent imposition of acreage limitations, is misplaced in four essential respects: (i) *Ivanhoe* did not involve the Project Act; (ii) In *Ivanhoe*, as the Court said, "It is interesting to note that irrigators in this district receive water diverted from the San Joaquin in which they never had nor were able to obtain any water right." 357 U.S., at 285. Here, the water rights which would be impaired are not only vested under state law, but have been perfected by actual use, thus meeting the federal statute's definition of present perfected rights. (iii) In *Ivanhoe*, the federal statute was construed as authorizing the federal taking of state-generated water rights. Here, the statute directs that such rights be satisfied, not taken. (iv) In *Ivanhoe*, the district agreed

that the acreage limitation should apply, the contract so stated, and the voters authorized the contract on that understanding. Here, the reverse is true. Court of Appeals, 559 F.2d, at 37, relies upon a dictum in *Ivanhoe* which attributes § 8 of the Reclamation Act of 1902 only a restricted mandate to recognize state law in the acquisition of water rights, not in the operation of a dam, a dictum which this Court, in *California* v. *United States,* 438 U.S. 645, 674-75 (1979), said "went further than was necessary" in restricting the scope of that section. In any event, that dictum in *Ivanhoe* is inoperative here: § 6 of the Project Act unquestionably controls the Secretary in the operation of the dam and reservoir, directing that they shall be so operated as to satisfy rights theretofore perfected under state law.

B. The legislative history of the Boulder Canyon Project Act confirms that § 14 was not intended to imply an authority to limit water deliveries to 160 acres of private land in single ownership

The legislative history of the Project Act spanned a period of some 10 years.[24] During that time, the subject of acreage limitations was thoroughly debated in the committees and on the floors of Congress. Bills which contained the same limited incorporation of the reclamation law (*i.e.,* "except as otherwise herein provided") that appears in § 14 of the Project Act were repeatedly attacked by proponents of acreage limitations on the ground that these bills did not limit deliveries of water on private lands to a maximum of

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[24] The first "Kettner Bill," H.R. 6044, authorizing construction of a canal connecting the District's irrigation system to Laguna Dam, was introduced on June 17, 1919. The Project Act was signed into law by President Coolidge December 21, 1928, and became effective June 25, 1929.

160 acres per landowner. Various amendments were proposed to provide for acreage limitations, and the first bill to pass the House contained such an amendment. But, in the end, Congress elected not to limit water deliveries from the project on private lands to 160 acres, and the bill passed by both houses and signed by the President contained no acreage limitation provision, except as to public lands.

The bills that ultimately passed the House and Senate in 1928 were the fourth in a series of bills introduced by Congressman Swing and Senator Johnson of California.[25] The provisions of § 14 of the Project Act originated in the third set of Swing-Johnson bills. These bills provided:

> "This act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided."

As introduced, the third Swing-Johnson bills did not contain express acreage limitation provisions. These bills were referred to the Department of the Interior

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[25] The first Swing-Johnson bills were S. 3511, 67th Cong., 2d Sess., 62 Cong. Rec. 5929 (April 25, 1922), and H.R. 11449, 67th Cong., 2d Sess., 62 Cong. Rec. 5985 (April 25, 1922); the second Swing-Johnson bills were S. 727, 68th Cong., 1st Sess., 65 Cong. Rec. 146 (Dec. 10, 1923), and H.R. 2903, 68th Cong., 1st Sess., 65 Cong. Rec. 217 (Dec. 10, 1923); the third Swing-Johnson bills comprised S. 1868, 69th Cong., 1st Sess., 67 Cong. Rec. 1232 (Dec. 21, 1925), H.R. 6251, 69th Cong., 1st Sess., 67 Cong. Rec. 1313 (Dec. 21, 1925), S. 3331, 69th Cong., 1st Sess., 67 Cong. Rec. — (Feb. 27, 1926); and H.R. 9826, 69th Cong., 1st Sess., 67 Cong. Rec. 4730 (Feb. 27, 1926); and the fourth Swing-Johnson bills were S. 728, 70th Cong., 1st Sess., 69 Cong. Rec. 341 (Dec. 9, 1927), and H.R. 5773, 70th Cong., 1st Sess., 69 Cong. Rec. 97 (Dec. 5, 1927).

for comments. Secretary Hubert Work submitted comments and suggested amendments in a letter dated January 12, 1926. *Colorado River Basin: Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess., pt. 1, 5-9 (1926). Secretary Work did not recommend an amendment to expressly require acreage limitations on private lands.

Congressman Swing redrafted his bill to reflect the Interior Department's comments and proposed amendments as contained in Secretary Work's letter, and reintroduced the bill as H.R. 9826. H.R. 9826 contained the limited incorporation of the reclamation law quoted above (which appears *verbatim* in § 14 of the Project Act), but no express acreage limitation. Dr. Elwood Mead, Commissioner of Reclamation, then appeared before the House Committee on Irrigation and Reclamation to explain the Interior Department's views on the bill. Dr. Mead and Congressman Swing both testified that there was no provision in H.R. 9826 which would impose acreage limitations on lands receiving water from facilities authorized by the act:

> "MR. SINNOTT. I would like to ask the doctor is there any provision in the bill sponsored by the Secretary of a farm unit on the lands to be irrigated?
>
> "DOCTOR MEAD. This bill does not go beyond the provisions for three things. One is the dam—the reservoir—and the second is the power plant, and the third is the all-American canal. That is all it deals with. It does not deal with irrigation of new lands at all.
>
> "THE CHAIRMAN. That is reserved for future legislation?
>
> "DR. MEAD. Yes, sir.

"MR. SINNOTT. But as to the old land——

"DOCTOR MEAD. As to the old land, it would be sold water under a Warren contract.

"MR. SINNOTT. The present owner can occupy his present farm unit?

"DOCTOR MEAD. Yes, sir.

"MR. SINNOTT. No matter what that might be?

"DOCTOR MEAD. Yes.

"MR. SINNOTT. What is that now in the Imperial Valley?

"DOCTOR MEAD. Of course, it varies widely. There is not any law. There are a good many large holdings there.

* * * * *

"THE CHAIRMAN. How was the title acquired to these large holdings? Was it acquired from the railroads?

"DOCTOR MEAD. I think in the first place the title was acquired in 640-acre tracts.

"MR. SWING. That is the maximum under which title was acquired.

"MR. SINNOTT. There is nothing in this bill requiring the landowner to sell the surplus over a farm unit of 160 acres at a price to be fixed by the Secretary, as is now in the present reclamation law?

"MR. SWING. No, sir." *Id.*, at 32-33.

It is to be emphasized that the bill of which Dr. Mead and Congressman Swing were speaking contained the very same provision which the Court of Appeals held to require acreage limitations in the District. Thus, the Court of Appeals' interpretation of § 14 is flatly contradicted by the author of that

provision (Congressman Swing) and by the agency responsible for reviewing it (the Department of the Interior). *Moreover, no one suggested in the House proceedings that the § 14 language authorized acreage limitations on private lands.*

After completion of the hearings on H.R. 9826, the House Committee on Irrigation and Reclamation amended the bill to include an express acreage limitation provision.[26] The committee reported H.R. 9826, as amended, favorably, but the bill did not come up for a vote on the House floor.

On the Senate side, S. 3331 was referred to the Committee on Irrigation and Reclamation, which reported the bill favorably with the limited incorporation of the reclamation law now appearing in § 14, but without an express acreage limitation provision other than that imposed by § 9 on desert public lands.

During debates on the Senate floor, Senator Phipps offered an amendment to § 5 of the bill, generally similar to that adopted by the House Committee, which would have specifically limited deliveries of water on

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[26] "[A]ll contracts for the delivery of water for irrigation purposes provided for in section 5 shall provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the said Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works provided for by this act; and that no such excess lands so held shall receive water from said canal if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior . . . ." H. Rep. No. 1657, 69th Cong., 2d Sess. 29-30 (1926).

private lands to 160 acres.[27] 68 Cong. Rec. 4766 (1927). Senator Phipps also offered a substitute bill which contained (i) an express acreage limitation identical to that contained in his proposed amendment, and (ii) the limited incorporation of the reclamation law which originated in the third Swing-Johnson bills and was ultimately carried forward verbatim into § 14 of the Project Act. *Id.* at 4764. Neither Senator Phipps' amendment to § 5 nor his substitute bill was adopted. Again, no one suggested that the result sought by Senator Phipps—*i.e.*, the application of acreage limitations to private lands—could be achieved through the language in § 14.

The fourth Swing-Johnson bills, H.R. 5773 and S. 728, were introduced in the first session of the 70th Congress. Again, both bills contained the § 14 language incorporating the reclamation law "except as otherwise herein provided." H.R. 5773, as introduced, contained the acreage limitation provision that had been added to the third Swing-Johnson bill by the House Committee on Irrigation and Reclamation (for the

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[27] Senator Phipps' proposed amendment to § 5 of S. 3331 provided:

> "(b) All contracts for the delivery of water for irrigation purposes shall provide that all irrigable land held in private ownership by any one owner in excess of 160 acres shall be appraised in a manner to be prescribed by the Secretary of the Interior, and the sale prices thereof fixed by the said Secretary on the basis of its actual bona fide value at the date of appraisal, without reference to the proposed construction of any irrigation works under the provisions of this act; and that no such excess lands so held shall receive water if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior. Contracts respecting water for irrigation and domestic uses shall be for permanent service."

text of this provision, *see* n.26, *supra* at 42). S. 728, as introduced, contained no such provision. It was referred to the Senate Committee on Irrigation and Reclamation, where Senator Ashurst proposed an amendment that would have added the acreage limitation provision contained in the House bill. Senator Ashurst explained his amendment as follows:

> "I offered an amendment before the committee that would subject the privately owned lands to the same conditions as lands in other irrigation projects privately owned, so that no water user might secure water for land in excess of 160 acres." S. Rep. No. 592, 70th Cong., 1st Sess., Part 2 at 26 (1928).

In addition, Senator Phipps, chairman of the committee, introduced his own bill, S. 1274, which was substantively identical to S. 728 except that it contained an express acreage limitation provision in addition to the § 14 language.[28] The committee considered S. 728 and S. 1274 together. It did not adopt Senator Ashurst's acreage limitation amendment, nor did it report the chairman's bill, S. 1274, with the acreage limitation provision. Instead, the Committee reported S. 728 without an acreage limitation, other than the present § 9 provision as to public lands, and recommended passage.

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[28] *Colorado River Basin: Hearings on S. 728 and S. 1274 Before the Senate Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 2-3 (1928). The acreage limitation provision proposed by Senator Phipps in § 5(b) of S. 1274 was identical to the amendment to § 5 of S. 3331 which Senator Phipps proposed unsuccessfully in the previous Congress, and which is reproduced *supra* in n.27.

When S. 728 reached the Senate floor, the proponents of acreage limitations renewed their attacks on the bill and their efforts to amend it. Senator Hayden proposed an amendment to S. 728 on the Senate floor, identical with that appearing in H.R. 5773 (see n.26, *supra.*).

In explaining this amendment on the Senate floor, Senator Hayden brought to the attention of his colleagues the existence of such a provision in the House bill:

> "We find that in the companion bill to the measure now under consideration by the Senate that the House Committee on Irrigation and Reclamation has included a provision limiting the area in individual ownership to 160 acres. I have, therefore, rather than copy the law as enacted with respect to the San Carlos project in Arizona, taken from the House bill the language of an amendment which I now offer . . . ." 69 Cong. Rec. 9451.

The Senate did not adopt Senator Hayden's amendment. As the debates continued, Senator Ashurst assailed the absence of an acreage limitation provision in the bill, 69 Cong. Rec. 10471, and reminded the Senate that he had unsuccessfully proposed an amendment authorizing acreage limitations in committee. *Id.,* at 10495. In the closing days of debate on S. 728, Senator Ashurst stated that he objected to the bill because:

> "[T]he bill authorizes the expenditure of millions of dollars of Federal funds to irrigate lands owned largely by private-land speculators in California in units in excess of 160 acres." 70 Cong. Rec. 289 (1928).

At no time during the debate did any member of the Senate suggest that the § 14 language, which appeared

in the bill, would authorize acreage limitations and thereby dispense with the need for an amendment of the kind proposed by Senators Ashurst, Hayden and Phipps. The Senate passed S. 728 without an acreage limitation provision (other than § 9) on December 14, 1928. *Id.*, at 603. The House passed the Senate version on December 18, 1928, *id.*, at 838, and President Coolidge signed the bill into law on December 21, 1928.

It is to be emphasized again that all of the above-described efforts to include an acreage limitation in the Project Act—both in the House and in the Senate—were directed to bills which contained language identical to that of § 14 of the Project Act. If § 14 implicitly imposes acreage limitations, as the Court of Appeals held, all of these efforts would have been superfluous. *Yet not one statement appears anywhere in the legislative history of the Project Act in either the Senate or the House to the effect that § 14 incorporates the acreage limitation provisions of the reclamation law.*

C. Thirty-one years of consistent administrative construction by six secretaries confirms that the Project Act does not authorize acreage limitations in Imperial Valley

Under § 4(b) of the Project Act, before any money could be appropriated for construction of the All-American Canal, and before construction could commence, the Secretary was required to insure, by contract or otherwise, payment of construction, operation and maintenance expenses of the canal. In addition, § 5 of the Project Act authorized the Secretary to enter into contracts for the storage and delivery of water. Accordingly, as of December 1, 1932, the United States and the District entered into a contract which pro-

vided for the payment of construction costs of the All-American Canal by the District, and for delivery of the District's water through that canal.[29] This contract made no mention of acreage limitations with respect to private lands in the Imperial Valley. It was signed on behalf of the United States by Secretary Ray Lyman Wilbur on December 1, 1932. He had approved it as to form on November 4, 1931, after a public hearing. U.S. DEPARTMENT OF THE INTERIOR, THE HOOVER DAM CONTRACTS 563 (1933).

As required by state [30] and federal [31] law, as well as by Article 31 of the contract,[32] the contract was submitted to a state court of competent jurisdiction for a determination of its validity. *Hewes* v. *All Persons, supra.* Charles Malan, one of the parties to the validation proceeding, alleged that the contract was invalid because it would limit deliveries of water on private lands to 160 acres in single ownership. In specific response to this allegation, Secretary Wilbur issued a letter-ruling to the effect that neither the Project Act nor the contract authorized the application of acreage limitations to privately owned lands in the District:

> "Early in the negotiations connected with the All-American Canal contract the question was raised regarding whether and to what extent the 160-acre limitation is applicable to lands to be irrigated from this canal. Upon careful consideration the view was reached that this limitation does not apply to lands now cultivated and having a

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[29] For the text of the contract, *see* App. 177a.

[30] 1917 Cal. Stat. 245 and 1897 Cal. Stat. 254.

[31] 42 Stat. 541, 43 U.S.C. § 511.

[32] Reproduced at App. 203a.

> present water right. These lands, having already a water right, are entitled to have such vested right recognized without regard to the acreage limitation mentioned. Congress evidently recognized that these lands had a vested right when the provision was inserted that no charge shall be made for the storage, use, or delivery of water to be furnished these areas." 71 I.D., at 530.

It is significant that this construction of the Project Act and of the contract was made by the individual who negotiated and signed the contract on behalf of the United States.

If Secretary Wilbur had decided otherwise, he would have been acting in contravention of regulations, in force since 1910 (and still in force today), which say that the land limitation in § 5 "does not prevent the recognition of a vested right for a larger area and protection of the same by allowing the continued flowing of the water covered by the right through the works constructed by the Government under appropriate regulations and charges." 38 L.D. 637; 43 C.F.R. 230.70; App. 216a. See discussion *infra* at 66-67.

Although Secretary Wilbur's ruling specifically mentioned only § 5 of the Reclamation Act, and not § 46 of the Omnibus Adjustment Act, the Department of the Interior subsequently confirmed that the ruling embraced § 46 as well. In a letter dated March 1, 1933, P. W. Dent, Assistant Commissioner and Chief Counsel of the Bureau of Reclamation, stated:

> "In my view the same principle discussed in the Secretary's letter of February 24, based upon section 5 of the reclamation act, involves precisely that contained in section 46 of the act of May 25,

1926. The latter act merely ties up with and emphasizes what has always been the law in this respect.

"The Secretary's letter was directed to the specific allegations in the complaint, which, so far as could be ascertained, had no direct reference to the act of May 25, 1926. I assume, however, that regardless of the allegations in the complaint, Mr. Childers is apprehensive that argument may be submitted based upon the 1926 act. If this is done it seems to me the defense would necessarily be based upon the propositions, first, that the All-American Canal work constitutes a special project specifically authorized by the Boulder Canyon Project Act and that this stands upon a basis quite different from the ordinary conception of a project. The second proposition is that the acreage limitation in the reclamation law (including section 46 of the act of May 25, 1926) does not apply to the lands having a vested right." Con. Apx. 179a.[33]

Following Secretary Wilbur's ruling, the court in *Hewes* held that neither the Project Act nor the contract authorized the application of acreage limitations to privately owned lands in the District, that therefore the objections of Malan should be overruled, and that the contract was valid.

For the next 31 years, Secretary Wilbur's construction of the Project Act and of the contract was consistently adhered to by the United States. During that period, the Department of the Interior did not once refute Secretary Wilbur's ruling, and on a number

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[33] This Court, in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 290 (1958), referred to § 46 of the 1926 act as a "reenactment" of § 5 of the 1902 act.

of occasions positively reaffirmed it. 322 F.Supp., at 23-27.

Secretary Wilbur was succeeded by Secretary Harold L. Ickes, who took office March 4, 1933, and served until February 15, 1946. He served simultaneously as Public Works Administrator. Secretary Ickes' interpretation of the Project Act confirmed that of Secretary Wilbur. As Secretary, Ickes could have repudiated Secretary Wilbur's ruling of February 25, 1933, that the Project Act did not authorize imposition of acreage limitations on private land in Imperial Valley. He did not. He adhered to it for the 13 years that he was in office.

Secretary Ickes' first opportunity to reverse Secretary Wilbur was in the validation proceeding on the District's contract, to which Secretary Wilbur's ruling had been transmitted. Trial commenced March 16, 1933. Judgment was not entered until July 5, 1933. Far from repudiating Secretary Wilbur's interpretation, Secretary Ickes concurred in it. As Public Works Administrator, he withheld approval of an allocation of funds to commence construction of the All-American Canal until an appeal by an excess landowner from the judgment in the *Hewes* case was dismissed.[34] When the appeal was dismissed, in February of 1934, he proceeded to allocate funds. Between March 20, 1934, and June 22, 1936, Secretary Ickes, in his capacity as Public Works Administrator, allocated some $22 million of P.W.A. funds for the construction of the All-American Canal, and so advised Congress. *Interior Department*

[34] The record in the District Court shows a protest from the attorney for the excess landowner against Secretary Ickes' insistence on dismissal of his appeal. Exhibit LX-BK.

Appropriation Bill, 1937: Hearings before Subcommittee of House Committee on Appropriations, 74th Cong., 2d Sess. 1162 (1936). After June 22, 1936, when the All-American Canal became a line item in the Interior Department's budget, until 1942, when the Canal was completed, Secretary Ickes regularly sought congressional appropriations for construction of the Canal.

Secretary Ickes, not Secretary Wilbur, executed the repayment agreement with Coachella Valley County Water District, dated October 15, 1934, covering that district's share of the cost of the All-American Canal. *The Hoover Dam Documents, House Document No. 717,* 80th Cong., 2d Sess., at A633. The Coachella contract did not include an acreage limitation clause. That contract's reference to the reclamation law (Art. 29) was identical with that in the Imperial contract (Art. 30).[35]

Secretary Ickes, throughout his 13-year term of office, was firm in his opinion that the Project Act did not impose an acreage limitation on private lands in Imperial Valley because they possessed vested rights antedating the Project Act. His appointee, Assistant Commissioner of Reclamation William E. Warne (later Assistant Secretary) so testified before congressional committees in 1944. *Hearings on H.R. 3961, 78th Cong., 2d Sess., Subcommittee of Senate Committee on Commerce,* pt. IV, at 599. Mr. Warne put Secretary Wil-

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[35] An acreage limitation was first included in a Coachella contract in 1947, when the Department, acting through Secretary Krug, and Coachella entered into a contract for construction and repayment of the cost of a distribution system. U.S. Exhibit 10 in the District Court. This was the occasion of Solicitor Harper's opinion, *infra,* p. 53, n.37.

bur's letter of February 25, 1933, in the record in support of the Ickes administration's statement that acreage limitations were not applicable in Imperial Valley.[36]

In 1941, B.P. King, an attorney in the Bureau of Reclamation, acting pursuant to instructions issued by Secretary Ickes, completed a comprehensive report entitled "The Excess Land Provisions of the Reclamation Law." This report concluded that the acreage limitation provisons of the reclamation law were not applicable to the District. 322 F.Supp. at 24.

In 1942, Commissioner Page of the Bureau of Reclamation, Secretary Ickes' appointee, advised the General Counsel of the Federal Land Bank, which was making loans on farms in the District, that the acreage limitation provisions of the reclamation law were not applicable to the District. *Ibid.*

On May 31, 1945, Interior Solicitor Fowler Harper issued an opinion to the effect that the acreage limitation provisions of the reclamation law should be written into the contract for repayment of the cost of new distribution works serving Coachella Valley County Water District, which had no present perfected rights. Solicitor Harper's opinion was critical of the Wilbur ruling but did not purport to overrule it. Solicitor Harper acknowledged the inapplicability of acreage limitations to Imperial Irrigation District, where

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[36] Secretary Ickes executed four other major contracts under the Project Act: (i) with the City of San Diego, October 2, 1934, *The Hoover Dam Documents, House Document No. 717,* 80th Cong., 2d Sess., at A671; (ii) with the State of Arizona, February 9, 1944, *id.*, at A559; (iii and iv) with the State of Nevada, March 30, 1942, *id.*, at A571 and January 3, 1944, *id.*, at A579. None of these contains an acreage limitation on private lands.

"vested" (present perfected) rights existed, but noted that no such rights appeared to exist in Coachella:

> "Although the language of the letter of Secretary Wilbur seems broad enough to include the Coachella Valley District lands, the letter was clearly intended only to apply to the Imperial Irrigation lands. It apparently assumes that all privately owned land in the District was under irrigation and has a vested water right. Nothing in the files indicates whether such is the factual situation, and there is strong indication that the Coachella Valley lands are to a very large degree as yet not irrigated." [37]

In 1946, the Bureau of Reclamation, under Secretary J. A. Krug, issued a report entitled "Landownership Survey on Federal Reclamation Projects." This report stated that there were 402 land ownerships larger than 160 acres per single ownership in the District, and that the excess land provisions of the reclamation law were not applicable to these lands. *Ibid.*

In 1948, Secretary Krug reaffirmed the nonapplicability of acreage limitations to the District. Following the consummation of the Coachella supplemental contract, which expressly required that water deliveries be limited to 160 acres per landowner, the Veterans of Foreign Wars requested that Secretary Krug reverse Secretary Wilbur's ruling so that the District

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[37] As Judge Turrentine observed:

> "There was of course ample data then available to show that in Imperial Valley there were in excess of 400,000 acres receiving pre-project irrigation in reliance on rights to Colorado River water. The major weakness of the Harper decision as it relates to Imperial Valley is its failure to deal with this question of pre-project water rights." 322 F.Supp., at 25.

would be treated in the same fashion as Coachella. Secretary Krug declined. Without reaching the merits of the question, he explained the substantial inequity of reversing 15 years of consistent administrative interpretation, which had been relied upon by landowners in the District:

> "[W]e have concluded that inasmuch as the Secretary of the Interior then charged with the administration of law construed the acreage limitation as not being applicable to lands of the Imperial Irrigation District under the facts as he then understood them, and it being clear that the then owners and subsequent purchasers of irrigable lands in the Imperial Irrigation District were entitled to rely upon advice from the Secretary and thus establish an economy in the district consistently with that advice, they should not now be abruptly advised that the economy of the project is to be changed under a contrary ruling of the present officer charged with the administration of the law." 71 I.D., at 515; 322 F. Supp., at 24-25.

Solicitor White concurred in Secretary Krug's decision to reaffirm the Wilbur ruling. Exhibit LX-34 in the District Court.

In 1952, the contract between the United States and the District was amended by a supplemental contract, signed by Secretary Oscar L. Chapman. Solicitor Edward Weinberg, who participated in the contract negotiations, testified that the Department had considered attempting to negotiate an acreage limitation clause in the supplemental contract, but decided not to do so. See the discussion of Secretary Krug's actions, 322 F.Supp., at 25.

The Wilbur ruling was again affirmed by the Department of the Interior in 1958, when the Special Master in *Arizona* v. *California* requested briefs on the question of whether the acreage limitation provisions applied to the District. The Solicitor General requested the view of the Solicitor of the Department of the Interior. Solicitor Elmer F. Bennett, acting under Secretary Fred A. Seaton, replied that acreage limitations did not apply to the District. He specifically noted the history and consistency of the Department's practice in this respect:

> " 'The water contract between the United States and the Imperial Irrigation District was executed December 1, 1932, some 25 years ago. The negotiations leading to the contract were lengthy and extensively in the public view. Except at the time of court confirmation, *I am not aware of any challenge as to the legality of the contract during this entire period. Water has been delivered to the lands of Imperial District pursuant to the contract since the early 1940's. I am not aware that any administrative action has been proposed or taken either by the preceding administration or by this one to recognize or enforce application of the 160-acre limitation to the lands of the Imperial Irrigation District.*
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> " 'The United States acting through the then Secretary of the Interior accepted the contract as having been confirmed and acting thereon proceeded to initiate construction of the All-American Canal and engage upon a variety of transactions in reliance upon the validity of the contract. *There must surely arise a point of time, again I believe long since past, when the contract in keeping with the terms of Article 31 became binding upon the United States and the District.* To treat otherwise at this date could have far-reaching effect (emphasis added).' " 322 F.Supp., at 26.

Judge Turrentine summed up the administrative practice as follows:

> "This history of the administrative practice has necessarily been selective, but a thorough review of Departmental policy has failed to disclose a departure from the interpretation initiated by Secretary Wilbur until 1964. This interpretation was followed during the incumbencies of six successor Secretaries and four Presidential administrations." 322 F.Supp., at 26.

He identified the Secretaries:

> 'Secretary Ickes under Presidents Roosevelt and Truman; Secretaries King and Chapman under President Truman; Secretaries McKay and Seaton under President Eisenhower. During his tenure under President Kennedy, Secretary Udall did not disturb the interpretation." *Id.,* at n.30.

Not until 1964, when Solicitor Barry issued his opinion purporting to overrule Secretary Wilbur's ruling, did the Department of the Interior's policy depart from the ruling.

Subsequent to the Barry opinion, the Department of the Interior for several months attempted to negotiate a new contract with the District which would have incorporated the acreage limitation provisions of the reclamation law. When the District declined to negotiate a new contract, insisting on its rights under the existing contract, the United States brought this action for declaratory relief.

This Court has repeatedly applied the principle of statutory interpretation that an agency's long-standing construction of its statutory mandate is entitled to great weight. *E.g., United States* v. *Rutherford,* 442

U.S. 544 (1979); *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234 (1978); *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 304 (1977); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974); *Zemel* v. *Rusk*, 381 U.S. 1, 11-12 (1965); *Udall* v. *Tallman*, 380 U.S. 1, 16-18 (1965). Administrative interpretation is particularly persuasive (i) where, as here, the administrative practice involves a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new," *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933); (ii) where, as here, "[t]hese agencies cooperated in developing the act,"[38] *Adams* v. *United States*, 319 U.S. 312, 314-15 (1943); and (iii) where, as here, "Congress has refused to alter the administrative construction."[39] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 384 (1969).

The Court of Appeals acknowledged that, "in practice, the Department of the Interior did not enforce the 160-acre limitation on lands in the Imperial Irrigation District." 559 F.2d, at 540. The court concluded, however, that this practice was not determinative because it was justified on the basis of (i) the Wilbur ruling, which the Court of Appeals determined to be legally incorrect, and (ii) on what the court characterized as "previous inaction"—the Department of the Interior had used the term "fairness"—which, in the

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[38] For the role played by the Interior Department in the drafting of the Project Act, *see supra* at 39-41.

[39] For a discussion of congressional ratification of the Department of the Interior's interpretation of the Project Act to the effect that it does not authorize acreage limitations in the District, *see infra* at 60.

court's view, was not "an administrative determination to which the courts should defer." *Ibid.*

Of course, a court may always disregard an administrative practice which is clearly contrary to the statute pursuant to which the agency purported to act. Here, however, it would be ludicrous to assert that Secretary Wilbur's ruling was clearly wrong. It was in accord with longstanding regulations and practice (*see infra* at 66-67), it was confirmed by a court of competent jurisdiction (*see infra* at 69-72), it was made known repeatedly to Congress, which appropriated money to construct the All-American Canal with knowledge that it was to serve lands possessing vested rights, irrespective of their area, (*see infra* at 60-64), and it was adhered to by Secretary Wilbur's successors for 31 years. The most that might be said is that the Project Act is arguably susceptible to an interpretation other than that ascribed to it by Secretary Wilbur, and that the Court of Appeals would have adopted such an alternative interpretation, instead of that adopted by Judge Turrentine and the six Secretaries who adhered to Secretary Wilbur's interpretation, had the question come before it for decision. Even if this were supposed to be the case, however, it would not warrant judicial disregard of administrative practice many years after the fact. As this Court has said on numerous occasions:

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, *we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.*' Unem-

> ployment Comm'n v. Aragon, 329 U.S. 143, 153. See also, e.g., Gray v. Powell, 314 U.S. 402; Universal Battery Co. v. United States, 281 U.S. 580, 583 (emphasis added)." 380 U.S., at 16.

Thus, the Court of Appeals' disagreement with the Wilbur ruling, considered in light of the particular facts surrounding that ruling—namely, its subsequent judicial, congressional, and administrative ratification —does not justify retroactive judicial disregard of the administrative practice based on that ruling.

As to the Court of Appeals' contention that the administrative practice involved here should be disregarded because it was justified in part on "previous inaction": it is true that several of the later Departmental explanations for the non-application of acreage limitations to Imperial Valley were to the effect that a reversal of prior Departmental policy and practice would be unfair to those who had relied on that policy and practice. But such a concern with fairness and constancy is fundamental to the principle of administrative construction. As this Court in *United States* v. *Northern Pacific Railway Co.*, 242 U.S. 190 (1916), said:

> "Statutes should be construed, as far as possible, so that those subject to their control may, by reference to their terms, ascertain the measure of their duty and obligation, rather than that such measure should be dependent upon the discretion of executive officers, to the end that ours may continue to be a government of written laws rather than one of official grace." *Id.*, at 195.

And with specific regard to expectations created by long-standing administrative practice, this Court said

in *United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915):

> "It may be argued that while these facts and rulings prove a usage, they do not establish its validity. But government is a practical affair, intended for practical men. Both officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself,—even when the validity of the practice is the subject of investigation." *Id.*, at 472-473.

Individuals have for years bought and sold land, built farms, and paid ad valorem and estate taxes in the District in reliance on the United States' continuing assurance that the Project Act did not authorize acreage limitations there.

Moreover, the administrative practice involved here was not a failure to act or a casual disregard of a statutory mandate. Rather, it was a deliberate and positive interpretation of the statute. Clearly, public reliance on such a practice is a valid reason for continuing the practice, and in no way should detract from the importance of the practice for purposes of statutory construction.

D. Congress has ratified administrative construction to the effect that the Project Act does not authorize acreage limitations in the District

From 1934, when Secretary Ickes first appropriated P.W.A. funds for the construction of the All-American

Canal, until the present, Congress has been aware of the fact that deliveries of water to the District from the All-American Canal were not being limited to 160 acres in single ownership.[40] Yet Congress has never amended the Project Act to require such limitation.

Indeed, Congress has three times "revisited the Act and left the practice untouched." *Saxbe* v. *Bustos,* 419 U.S. 65, 74 (1974). In 1940, after extensive hearings, Congress enacted the Boulder Canyon Project Adjust-

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[40] *See, e.g., Hearings on H.R. 13710 Before a Senate Subcommittee on Appropriations,* 72d Cong., 2d Sess., at 97 (1933); *Hearings on H.R. 3961 Before a Subcommittee of the Senate Committee on Commerce,* 78th Cong., 2d Sess., pt. IV at 599, 631, 764-65 (1944); *Hearings on S. 295 Before a Subcommittee of the Senate Committee on Irrigation and Reclamation,* 78th Cong., 2d Sess., at 184, 450, 482 (1944); *Hearings Before a Subcommittee of the Senate Military Affairs Committee,* 78th Cong., 2d Sess., at 33 (1944); *Hearings on H.R. 6335 Before a Subcommittee of the Senate Appropriations Committee,* 79th Cong., 2d Sess., at 1108-19 (1946); *Hearings on Irrigation and Reclamation Before a Subcommittee of the House Committee on Public Lands,* 80th Cong., 1st Sess., at 11 (1947); *Hearings on S. 912 Before a Subcommittee of the Senate Committee on Public Lands,* 80th Cong., 1st Sess., at 159-60, 162, 166, 179, 431-32 (1947); *Hearings on S. 1385 Before the Senate Committee on Interior and Insular Affairs,* 81st Cong., 1st Sess., at 12, 15, 50-51 (1949); *Hearings on S. 1425, S. 2541, and S. 3448 Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs,* 85th Cong., 2d Sess., at 11, 19, 85, App. C at 7 (1958); *Acreage Limitation Policy, Committee Print of Senate Committee on Interior and Insular Affairs,* 88th Cong., 2d Sess., at 25, 350-51 (1964); *Water Policies for the Future, Final Report to the President and to the Congress of the United States by the National Water Commission* (1973); *Acreage Limitations in Bureau of Reclamation Projects: Hearings Before Subcommittee on Public Lands and Development of the Senate Committee on Energy and Natural Resources,* 95th Cong., 2d Sess., pt. 3 (1978); *Reclamation Reform Act of 1979: Hearings Before the Subcommittee on Energy Research and Development of the Senate Committee on Energy and Natural Resources,* 96th Cong., 1st Sess. (1979).

ment Act, 54 Stat. 779, 43 U.S.C. §§ 618 *et seq.*, which superseded various financial provisions of the Project Act, and specifically reenacted certain other provisions of that Act relating to water rights. In 1946, Congress passed an act to amend § 9 of the Project Act, 60 Stat. 36, 43 U.S.C. § 617h, which limits entries on public lands to 160 acres. And in 1968, Congress further supplemented the Project Act with the Colorado River Basin Project Act, 82 Stat. 886, 43 U.S.C. §§ 1501, *et seq.*, enacted after this Court's opinion and first decree in *Arizona* v. *California*. That Act provided *inter alia* that the Secretary, in making allocations under the Project Act in time of shortage must first satisfy present perfected rights in order of priority. In none of these three instances did Congress take action to require a change in the administrative practice—known to Congress—of delivering water to the District without regard to acreage, in satisfaction of present perfected rights.

This Court has held that, in appropriate circumstances, congressional acquiescence in an administrative practice which is not in complete harmony with the statutory language can have the effect of qualifying that language. For example, in *Saxbe* v. *Bustos*, *supra*, the Court said:

> "Such a history of administrative construction and congressional acquiescence may add a gloss or qualification to what is on its face unqualified statutory language." 419 U.S., at 74.

It is an *a fortiori* proposition that where, as here, administrative construction and congressional acquiescence therein are in complete conformity with the "unqualified statutory language" (*i.e.*, the § 6 requirement that present perfected rights be satisfied and the § 14 provision that the reclamation law applies only to the

extent that it is not in conflict with specific provisions of the Project Act), such congressional acquiescence should be accorded great weight in the construction of the relevant statute.

Nor has Congress' role been limited to mere acquiescence in the face of a known administrative practice. Congress has also taken affirmative steps to ratify that practice. Every year from 1936 through 1950, Congress appropriated funds for the construction and/or operation of the All-American Canal with knowledge that deliveries to the District were not being limited to 160 acres in single ownership.[41]

In *Ivanhoe Irrigation District* v. *McCracken, supra,* this Court held *inter alia* that annual appropriation of funds by Congress for the Central Valley Project constituted ratification of an administrative construction to the effect that the excess lands provisions of the reclamation law applied to the Central Valley Project. 357 U.S., at 293. If the same reasoning is applied to the circumstances of the present case, which involves a different statute (the Project Act) and a different administrative construction, one must conclude that Congress, in making large, annual appropriations for the All-American Canal, ratified administrative construction to the effect that the Project Act does not

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[41] 49 Stat. 1757, 1785 (1936); 50 Stat. 564, 596 (1937); 52 Stat. 291, 223 (1938); 53 Stat. 685, 718 (1939); 54 Stat. 406, 437 (1940); 55 Stat. 303, 336 (1941); 56 Stat. 506, 535-36 (1942); 57 Stat. 451, 476 (1943); 58 Stat. 463, 489-90 (1944); 59 Stat. 318, 342 (1945); 59 Stat. 632, 648 (1945); 60 Stat. 348, 368 (1946); 61 Stat. 460, 476 (1947); 62 Stat. 1112, 1131 (1948); 63 Stat. 765, 782 (1949); 64 Stat. 275, 285 (1950); 64 Stat. 595, 686 (1950). Appropriations for operation were no longer required after transfer of operation by Secretary Chapman to the District in 1952 (*supra,* p. 54).

authorize application of the excess lands provisions of the reclamation law to the District.

Judge Turrentine aptly summed up the congressional ratification of Secretary Wilbur's ruling with the following findings:

> "Congress for more than 30 years was fully aware of the 1933 ruling and interpretation of Secretary Wilbur and of the administrative practice predicated thereon. The Imperial Valley situation in light of such interpretation and practice was called to its attention in appropriation hearings for the construction and operation of the All-American Canal, at the hearings on the Central Valley and San Luis projects and at the hearings on the Small Projects Act of 1958.
>
> * * * * *
>
> "In addition to the foregoing, copies of the Bureau of Reclamation's excess land surveys of 1946 and 1964 were filed with Congress.
>
> "At no time from 1933 to the present has Congress taken any action in derogation of the propriety of the Wilbur interpretation or of the long standing administrative practice which followed it." 322 F.Supp., at 27.

This congressional ratification of administrative construction is entirely consistent with the plain language of §§ 6 and 14 of the Project Act, with the legislative history of the Act, and with the *Hewes* decision, and is therefore entitled to great weight.

II.

The Decisions Not To Apply An Acreage Limitation To The Privately Owned Lands In Imperial Irrigation District Have Become Final and Irreversible

As with any other major project of comparable size, Congress left many details—some quite important—

to secretarial discretion. These included, for example, the design, the capacity, and even the location of Hoover Dam, and the size of the All-American Canal. Congress' overriding intention, however, was that decisions once made were not subject to being remade by each new Secretary of the Interior. Hoover Dam is set in cement and steel, and located in Black Canyon, not Boulder Canyon; but it takes no argument to prove that the Secretary's discretion having been exercised, and the cement poured, his decision cannot be remade even if Boulder Canyon were now proved to be a better location.

The legal decisions were meant to be equally irrevocable—as irrevocable as any aspect of the law, state or federal, relating to the title to real property. Water rights, indeed, are real property. In Imperial Valley, they are the only rights, other than mineral rights and geothermal rights, that give land its value.

Who was to receive water stored behind Hoover Dam was a matter of overriding concern throughout the Colorado River Basin from the first moment the possibility of such a dam was conceived—a dam "in or for the benefit of the Lower Basin." Article VIII of the Colorado River Compact, written in 1922, expressed the core principle that, "Present perfected rights"—water rights perfected by appropriation and use of water—were to be unaffected by the Compact, except in one carefully specified particular: they should attach to and be satisfied by the waters stored by any lower basin reservoir with a capacity of five million acre-feet or more.

Disposition of the water stored behind Hoover Dam was provided for in the legislation authorizing its construction. That legislation incorporated and perpetuated, with repeated and meticulous emphasis, the protections for existing rights specified in the Colorado River Compact. The dam must be used to satisfy "present perfected rights."

Every device known to the law was prescribed in an effort to put at rest and to determine conclusively any questions about rights to the use of that water. Specifically, the devices directed to be employed were (i) general regulations to control the writing of contracts for the use of water stored behind Hoover Dam, (ii) contracts "for permanent service" which once written could not be rewritten, except of course with the consent of the parties, and (iii) the device of the validation proceeding, 43 U.S.C. § 511, to set the arrangements in the cement of res judicata.

A. Regulations

Secretary Wilbur's determination that acreage limitations do not apply to privately owned lands in the District was made in the course of discharging the responsibility placed on him by the Project Act in making the contract with the District. It was a ruling adhered to by all of his successors—six Secretaries in four Presidential administrations, over a period of more than three decades—until this suit was initiated.

If Secretary Wilbur had decided otherwise, he first would have had to vacate the Department's 1910 regu-

lation (App. 216a) which codified Departmental practice prevailing since at least 1905:

> "The provision of section 5 [42] of the reclamation act limiting the area for which the use of water may be sold does not prevent the recognition of a vested right for a larger area and protection of the same by allowing the continued flowing of the water covered by the right through the works constructed by the Government under appropriate regulations and charges."

It is axiomatic that an agency is bound by its own regulations and that the public is entitled to rely on those regulations. Professor Davis puts it this way:

> "[A] legislative rule is clearly binding on the agency that issues it. The best single authority may now be United States v. Nixon, 418 U.S. 683, 694-696 (1974)." 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 98 (2d ed. 1979).

The 1910 regulation is clearly a legislative rule, and has remained in force, unchanged, for 70 years. It is now codified at 43 C.F.R. 230.70.

Secretary Wilbur's ruling, and the implementation of that ruling by Secretaries Ickes, Krug, Chapman, McKay, Seaton, and Udall (during his tenure under President Kennedy) were made against the background of two decisions of this Court which are foundations to the interpretation of the law of the Colorado River. The first was *Wyoming* v. *Colorado,* 259 U.S. 419 (1922), decided while the Colorado River Compact

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[42] Our footnote: this Court, in *Ivanhoe Irrigation District* v. *McCracken,* supra, called § 46 of the Omnibus Adjustment Act of 1926 a "reenactment" of § 5 of the Reclamation Act of 1902. 357 U.S., at 290.

was under negotiation, and declaring that prior appropriation is the controlling principle of interstate adjudications of interstate water rights among western states, except where expressly departed from. That decision produced the Colorado River Compact. The second was *Arizona* v. *California,* 283 U.S. 423, 459 (1931), in which Justice Brandeis articulated the essential feature of a water right in western states, acquired by appropriation and use: "a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations." This decision upheld the authority of the Secretary, challenged by Arizona, to construct Hoover Dam. The Project Act was valid because it did not interfere with those vested rights.

B. Contract

Contract has always been a central device in reclamation law to make clear, definite, and durable the rights, including institutional arrangements for their satisfaction, in reclamation projects. In the beginning (*i.e.*, after 1902 when the Reclamation Act was passed) contracts arose out of water right applications by individual farmers using water. Such an arrangement was cumbersome, and had been largely discarded before the Project Act in favor of contracts with an irrigation district or public entity. 43 U.S.C. § 511. The irrigation district was a practical necessity in the administration of projects.

There is no question as to the intention of the parties to the contract between the Secretary of the Interior and the District. It was just as clear here that they did not intend to include an acreage limitation—

Secretary Wilbur said so in writing—as it was clear in *Ivanhoe* that the parties intended the opposite. The electors of the District approved the contract on that understanding, as the court in *Hewes* found. App. 144a, Finding 35.

Not only was the contract a device to secure certainty; it was a device to secure consensus and understanding among the water users by making clear what they were receiving and what responsibilities they were undertaking in exchange for those benefits.

C. Validation by judicial proceeding

The contract between the United States and the District required judicial validation. 43 U.S.C. § 511. Article 31 of the contract repeated the language of that statute.

The purpose of the requirement of validation was clear. That purpose was to give legal certainty to all the matters which were the subject of the contract—to set in legal cement the terms of the mutual undertakings of the District and the United States, sealed by the doctrine of res judicata.

The Court of Appeals says that everything determined by such a proceeding, other than "validity," is "pure dicta." 559 F.2d, at 526. The court was led into error by reading, in isolation, two sentences from the California Supreme Court's two opinions in *Ivanhoe Irrigation District* v. *All Parties:*

> (i) "The judgment [in a confirmation proceeding] is limited to a determination of the validity of the contract." 47 Cal. 2d at 607, 306 P.2d at 829 (1957).

(ii) "This proceeding is *in rem* in nature. In such an action the only issue involved is the validity of the contract." 52 Cal. 2d 692, 699, 3 Cal. Rptr. 317, 320, 350 P.2d 69, 72 (1960).

One of these utterances preceded, and one followed, the opinion of this Court in *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275 (1958). Both sentences are quoted by the Court of Appeals. 559 F.2d, at 525.

It is clear that these sentences in isolation do not state the effect of a validation proceeding in California. A judgment determining solely the abstract question of validity without reference to what the contract provided would serve no useful purpose. What is worse, it would have all the destructive power of a loose cannon on the pitching deck of a man-of-war in heavy seas. Such a judgment would conclusively determine that the contract was binding, but without regard to how it might be construed or interpreted.

No one can read the two *Ivanhoe* opinions of the California Supreme Court and the intervening opinion of this Court without recognizing that the California court, in the first case, determined that a contract with an acreage limitation clause could not be valid. The second California Supreme Court opinion determined that the contract was valid incorporating the acreage limitation. The state court determined, in each instance, what it purported to determine. This Court would have had no jurisdiction on certiorari to hear the case and to reverse if the only determination had been abstract "validity" or the capacity of the District to enter into some kinds of contracts.

Validation proceedings have been an essential part of reclamation law ever since the California legislature enacted the Wright Act in 1887. That act established the pattern, copied in most of the states of the west, to achieve the finality of res judicata by a judicial proceeding.

As early as 1913, in *Hanson* v. *Kittitas Reclamation District,* 75 Wash. 297, 134 Pac. 1083 (1913), the preclusive effect of a validating judgment was sustained. *Andrews* v. *Lillian Irrigation District,* 66 Neb. 458, 92 N.W. 612 (1902), *rehearing,* 97 N.W. 336 (1903). The Washington court acknowledged the California Wright Act as the model for the Washington Act and similar irrigation district laws in fourteen of the sixteen States in which irrigation was practiced. The court also pointed out that the in rem proceeding, which results in a judgment against "the world," is not novel. Adjudications in bankruptcy, admiralty, and receiverships have the same in rem nature.

The usefulness of validation proceedings is dependent on the resulting judgments effectively deciding the litigated questions. It should be remembered that res judicata is not a technical and medieval doctrine. It is a doctrine which it would be necessary to invent if it did not exist. Most of the changes have been in the direction of extending its finality. *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371 (1940), decided by a unanimous court, illustrates the reach of finality. In *Chicot County,* a judgment based on an unconstitutional statute achieved finality. Bonds were discharged in a municipal bankruptcy, and their holders appealed. While appeal was pending, the bankruptcy law was held unconstitutional by this Court in another case. The Court held in *Chicot*

County that the discharge was res judicata despite unconstitutionality of the statute.

This Court, in *Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, 336-337 (1958), made an observation that is particularly appropriate here. Speaking of the finality to be accorded under the Federal Power Act to a court of appeals decision on review of an order of the Federal Power Commission, it said:

> "Such statutory finality need not be labeled res judicata, estoppel, collateral estoppel, waiver or the like either by Congress or the courts."

Justice Whittaker's language expresses very well the purpose of Congress in enacting 43 U.S.C. 511, requiring judicial validation of the contracts of irrigation districts with the United States.

Law that has been relied on as final, based on every legal device to achieve certainty for nearly 50 years, cannot be rewritten retroactively.

The essence of a rule of property is justifiable reliance. The All-American Canal was constructed on the basis of the explicit and repeated understanding, made final by every doctrine of repose known to the law, that it would serve the same lands as the District's works which it replaced. The reliance was justifiable, if reliance can be placed on the pledged word of the United States of America.

The decision of the Court of Appeals would have been wrong in 1933, had it been substituted for that of the court validating the agreement of the United States and the District. It is egregiously wrong in 1980 after at least two generations, in reliance on the 1933 adjudication, have paid taxes and land prices based on the market value of the land irrigated.

D. The attempted destruction of established values.

Before leaving the subject of established values and turning to the subject (in Part III) of the standing of those who have intervened here in order to seize those values, it may be permissible to put the contrast between the two in sharp focus.

There was no increment of unjust enrichment to the landowners of 50 years ago in consequence of enactment of the Project Act. They were already irrigating all but three per cent of the land now irrigated by the All-American Canal. And if there were room for doubt, that doubt should have been dispelled when the District in 1934 was forced to seek the benefit of the municipal bankruptcy law because the land irrigated could not pay debt service on the existing bonded indebtedness,[43] quite aside from the new debt to the government.

The present landowners are the purchasers of the land served by the All-American Canal. They have nearly all paid the full market value of the land they own, or if they acquired it by devise or inheritance, they paid taxes based on market value. The annual ad valorem assessments are also based on market value. The Yellen group, if successful in establishing the law according to their allegations, will buy that land at less than market value, ripping off the present owners who have paid full market value, and—the day after their hoped-for purchase—they will be able to sell at full market value.

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[43] *In re Imperial Irrigation District*, 10 F. Supp. 832 (1934). Reversed in 87 F.2d 355 (1936), after the Municipal Bankruptcy Act had been declared unconstitutional in *Ashton* v. *Cameron County Water District*, 298 U.S. 513 (1936). After a new municipal bankruptcy act was sustained in *Bekins* v. *U.S.*, 304 U.S. 27 (1938), the District's reorganization plan was approved and became effective.

It would be ironic if the Yellen group, who are seeking a windfall, should be deemed to have acquired standing for that effort by invoking what they describe as the anti-speculation purposes of the reclamation law. As noted earlier (p. 9) the Interior Department, in proposing new regulations in 1977 (10 years after commencing this suit) stated one of the justifications of these regulations to be that:

> "The regulations discourage speculation by allowing the Department to exercise continuing supervision over the sale price of land after it is sold into non-excess status. *This reverses the current practice of allowing an excess land purchaser to realize the windfall profits represented by low-priced federal water in an immediate resale* (emphasis added)." App. 219a.

Further irony is added by an opinion of the Solicitor of the present Secretary, issued May 18, 1979, (M-36913, 86 L.D. 300), interpreting the proposed regulations, in which he said:

> "To summarize what follows, I hold that section 46 of the Omnibus Adjustment Act of 1926, 43 U.S.C. § 423e, requires the Secretary to control and approve the purchase price of both initial sales of excess land, and resales of this formerly excess land *until one-half of the construction charges allocated to such land has been paid* (emphasis added)." Interior Sol. Op. M-36913, *Reclamation Law—Control of the Sale Price of Formerly Excess Lands,* May 18, 1979, p. 1.

If the Solicitor's language means what it says, the consequence of the payment of one-half of the construction charges by the present landowners or their predecessors is this: (i) The present landowners, who, with their predecessors, made these payments, must

nevertheless sell their excess lands at below-market prices approved by the Secretary (if the Court of Appeals decision is given effect see 595 F.2d, at 527). But (ii) Dr. Yellen (or some other buyer at the Secretary's below-market price) can resell at once at full market price because, and only because, his unfortunate and unwilling vendor had paid off one-half of the construction charges. In this instance, the "present practice of allowing an excess land purchaser to realize the windfall profits" is not reversed, but reconfirmed. This result, outrageously unfair, is what the present Secretary's Solicitor reads into § 46 of the 1926 act as interpreted in his proposed regulations.

Beyond this, the Solicitor says that the proposed regulations, insofar as they give the Secretary power to police subsequent resales of lands sold at the Secretary's price, are not to be made retroactive, because this would be unfair to those who have bought and sold excess lands in reliance on past Departmental practice. This new concern about retroactivity might well have prevented the filing of this suit in the first place.

III.

The Court of Appeals Erred In Applying Constitutional "Case And Controversy" Requirements By Allowing Respondents, Ben Yellen, Et Al., To Participate As Parties Based On Conjectural Harm And Speculative Relief

We trust that the Court will reverse the decision of the Court of Appeals on the merits. But as this Court may regard the issue of respondents' standing to appeal from the judgment against the United States as a jurisdictional question, we are constrained to point out to the Court the extreme frailty of their claim of standing.

We contend that (i) the respondents, Dr. Yellen, *et al.*, never had standing, and (ii) assuming, *arguendo* they once had standing, it has been terminated under the terms of § 46 of the Omnibus Adjustment Act, because any authority in the Secretary of the Interior to fix prices on sales of excess lands in Imperial Valley expired on March 1, 1978, while this case was on appeal.

A. The constitutional tests of standing

In the recent case of *Gladstone Realtors* v. *Village of Bellwood,* 47 U.S.L.W. 4377 (April 17, 1979), this Court articulated the constitutional limits on standing in federal courts as follows:

> "In recent decisions we have considered in some detail the doctrine of standing in the federal courts. 'In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. . . . In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society.' *Warth* v. *Seldin,* 422 U.S. 490, 498 (1975).
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> "The constitutional limits on standing eliminate claims in which the plaintiff has failed to make out a case or controversy between himself and the defendant. In order to satisfy Art .III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. *Duke Power Co.* v. *Carolina Environmental Study Group,* —— U.S. ——, ——, 98 S. Ct. 2620, 2630 (1978); *Arlington Heights* v. *Metropolitan Devel-*

> *opment Housing Corp.*, 429 U.S. 252, 260-261 (1977); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *Warth* v. *Seldin, supra,* at 499; *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 (1973). Otherwise the exercise of federal jurisdiction 'would be gratuitous and thus inconsistent with the Art. III limitation.' *Simon* v. *Eastern Kentucky Welfare Rights Org., supra,* at 38."

Dr. Yellen, *et al.*, fail to pass these tests, as we show below.

B. How the respondents got into court

Dr. Yellen and his fellow respondents were allowed by the Court of Appeals (another panel) to intervene in the acreage case by mistake. As the Court of Appeals said here:

> "The order allowing intervention [559 F.2d, at 543] also appears to be based on a misunderstanding as to the identity of the various intervenors. The district court allowed various interested Imperial Valley landowners to intervene as defendants early in the proceedings. This Court's earlier order allowing intervention refers to the 'interested Imperial Valley landowners' as the group seeking to perfect and prosecute the appeal. In fact, this group had obtained a favorable decision from the district court and opposed the prosecution of an appeal by parties other than the government. It was the Yellen group, a group of nonlandowners, who had filed the protective notice of appeal and who sought to prosecute the appeal, and whose intervention request had been denied by the district court." 559 F.2d, at 520, n.15.

That order, 559 F.2d, at 543, mistaken as to the identity of Dr. Yellen and his colleagues (believing them to be intervening landowners, whereas their

claim of standing is based on their status as non-landowners), was mistaken also in its assumption that Dr. Yellen's standing in the residency case would be approved on appeal, and for this reason only (in order to enable both cases to be heard on the merits in one proceeding), their intervention on appeal in the acreage case was justified. As it turned out, however, the Court of Appeals reversed the District Court's holding that Dr. Yellen had standing in the residency case. The Court of Appeals concedes:

> "Since the district court decision in the residency case must be vacated because of lack of standing on the part of the plaintiffs therein, the basis for the order allowing intervention in the acreage case has disappeared." 559 F.2d., at 520.

And:

> "It would be ironic to allow the Yellen intervenors to use an erroneous district court ruling on standing in another case to bootstrap themselves into a position of litigating the important question of the enforcement of the federal reclamation laws in this case." *Id.,* at 521.

But the court proceeded to "once again examine the request for intervention," and held, de novo, that the Yellen intervenors did have standing to intervene after the judgment against the United States in the acreage case, in order to prosecute an appeal, notwithstanding the court's conclusion denying them standing in the residency case, even though they were in that case as plaintiffs, not as intervenors.

C. The lack of particularized injury

When the constitutional requirements for standing are properly applied, it becomes apparent that there

is no more basis for judicial action on their behalf in the acreage case than there was in the residency case.

These respondents did not intervene in the District Court proceedings, which lasted nearly four years. They intervened after a judgment against the United States, from which Solicitor General Griswold decided not to appeal (see *supra* at 5, n.3). Theirs is not a class action, but one by Dr. Yellen and others alleging that, as individuals, they have each been caused a particular injury by the failure of the Secretary to enforce the excess land provisions of the reclamation law; they say that if he did enforce those laws each of them would be able to buy land at less than present market prices. They do not, and could not, allege (i) that the Secretary could force a landowner to sell, or (ii) that, if a landowner did sell, he would select any of these respondents as a buyer, or (iii) that any respondent has a preference in any respect against any other citizen of the United States, wherever he resides. Their claim of standing is analogous to that which might be asserted by members of the general public, seeking to intervene after a judgment against the United States in a civil antitrust suit, who might allege that, if the government had won, the market price of the commodities manufactured by the defendant would be lower.

If these respondents had wanted to inject the particularized issues related to their own individual pocketbooks, as distinct from a class action of the generalized sort that the United States brought, they should have done so by intervening at the trial, not after a judgment on the issues framed by the pleadings of the United States and the District. There was never an opportunity, at the trial, to challenge or rebut their

assertions of fact in post-judgment affidavits, which the Court of Appeals accepted as true.

The Court of Appeals almost conceded the point, saying:

> "[A] party possessing the standing to intervene does not automatically have the ability to appeal a decision which all other parties have decided not to appeal. In order to be able to appeal, the intervenor must have an 'appealable interest.' [Citation omitted.] Resolution of this question turns on traditional standing analysis. [Citation omitted.] Mere interest in the establishment of a legal precedent is not sufficient. [Citation omitted.]" 559 F.2d, at 521.

But the court went on to decide, in result if not in words, that Dr. Yellen, *et al.* would have had standing to intervene in the District Court to participate in the trial (which they failed to do), and therefore these respondents had standing to intervene to appeal from the judgment against the United States, thus substituting their own value judgment for that of the Solicitor General, who had decided that the decision of District Judge Turrentine was right and should not be appealed. All parties to the proceedings in Judge Turrentine's court were satisfied with the outcome. Only the newcomer, surfacing after judgment, was not.

The Court of Appeals applied the Article III constitutional case and controversy requirements correctly to *Yellen* v. *Andrus,* the residency case, saying that respondents lacked standing because "the relief sought by the plaintiffs in this case would not come through the government action they seek" 559 F.2d, at 518, and that "any relief that could appropriately be ordered in this case would not redress plaintiffs'

alleged injuries." *Id.*, at 519. Moreover, plaintiffs in the residency case had suffered no particularized harm:

> "The injury plaintiffs allege—the inability to purchase farming land at prices they can afford—is neither particularized nor does it flow 'concretely and demonstrably' from the government's activities, or lack of activity, challenged in the complaint." *Id.*, at 519.

The Court of Appeals properly cites *Turner* v. *Kings River Conservation District,* 360 F.2d 184, 198 (9th Cir. 1966), in the residency case for the proposition that plaintiffs "cannot claim injury from any failure of the government to discharge its duty to the public." 559 F.2d, at 518, n. 10. The same reasoning should control in the acreage case between the same parties. Respondents present only a question "of broad social import where no individual rights would be vindicated . . . ." *Gladstone Realtors* v. *Village of Bellwood,* 47 U.S.L.W. 4377, 4379 (1979).

If there is a distinction between the residency and acreage cases, it is a distinction without a difference.

Here, as in the residency case:

> "[T]here is nothing in the record to indicate what price any plaintiff could afford to pay for any particular farm or that enforcement of the residency requirement of 43 U.S.C. § 431 will lead to a decline in farm land prices sufficient to bring those prices into a range where plaintiffs could afford to purchase a particular farm." *Id.*, at 518.

In the residency case, these same respondents alleged an injury which is described by the Court of Appeals as follows:

> "The essence of their case is that their ownership desires have been blocked because the government,

> by failing to enforce the residency provision of 43 U.S.C. § 431, permits irrigation water to be received by nonresident owners of farm land and that enforcement of the law will result in making farm land available for purchase at prices plaintiffs could afford." *Id.*, at 518.

This was found not to be enough. If this speculative parlay would not work in the residency case, it should have been held just as unworkable in the acreage case now at issue.[44]

D. Redress

On rehearing in the acreage case, the court made a concession and stated an assumption:

> "While it is true that landowners cannot be forced to sell their lands, it is only reasonable to assume that some land will become available for sale rather than being put into other than agricultural uses." 595 F.2d, at 527.

This assumption, in a nutshell, is the whole basis for Dr. Yellen's "standing." And, at that, the formula lacks, of necessity, an essential ingredient: there is not a shadow of a claim that if an excess landowner should decide to sell at the Secretary's below market price, rather than put his land into "other than agricultural uses," he could be compelled to sell to Dr. Yellen or another of the respondents, instead of electing to sell to some stranger to this suit. The absence of that element of standing, *i.e.*, that the requested remedy would redress the claimed injury to a particular individual,

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[44] In *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 72 (1978), this Court stated that there must be " 'a fairly traceable' causal connection between the claimed injury and the challenged conduct."

is fatal here, because this is not a class action, but a suit in strictly an individual capacity. Consequently, both injury and redressability must be shown as to these particular individuals, and this they have not done and cannot do.

E. Even if it is assumed arguendo that Dr. Yellen, *et al.*, once had standing, that standing would necessarily have ceased when one half the construction costs of the All-American Canal were repaid.

The standing of respondents was predicated wholly on the allegation that these particular people would benefit if the Secretary were enabled to fix prices at less than market value on the forced sale of excess lands.[45] But the Secretary's authority to fix prices, if he ever had it with respect to lands in the District, expired on March 1, 1978. Section 46 fixes a termination date on the Secretary's price-fixing authority in these terms:

> "[*U*]*ntil one-half the construction charges against said lands shall have been fully paid* no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior. . . . (emphasis added)."

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[45] This is a suit to enforce § 46 of the 1926 Act, not a suit to enforce § 5 of the Reclamation Act which also imposes a land limitation. The Court of Appeals was careful to make this distinction. 559 F.2d, at 537. The distinction was necessary because the court held that these same respondents lacked standing to sue to enforce the residency requirements of § 5. See 559 F.2d, at 517. It would have strained the imagination to discover that respondents had standing nevertheless to enforce the acreage limitation in that same section. But see *Ivanhoe Irrigation District* v. *McCracken*, which referred to the 1926 Act as a "reenactment" of § 5 of the 1902 Act. 357 U.S. 275, 290 (1958).

On March 1, 1978, the District completed repayment of more than one-half of the construction charges against all lands in the District. The court, on rehearing, acknowledged this, 595 F.2d, at 527, but held, on the authority of its decision in *United States* v. *Tulare Lake Canal Co.*, 535 F.2d 1093 (1977), that the Secretary's authority to fix the sale price "on initial break up of excess lands" applies "regardless of the fact that construction charges for the irrigation project have been repaid. This decision [*Tulare*] expressly applies to all federal reclamation projects subject to Section 46." 595 F.2d, at 527. The holding here flies so directly in the face of the statute as to require no argument. To the extent that *Tulare* supports it, we respectfully suggest that this Court disavow that decision as a precedent.

Moreover, the Department is on record at least twice with official interpretations of § 46 as terminating the Secretary's power to fix prices when half of the construction charge is paid.

Regulations published August 22, 1977 (not to become effective until July 1981), provide that price approval, with reference to "involuntary acquisition of excess land" (by foreclosure, inheritance, etc.) will be required "until one-half of the total construction costs allocated to irrigation have been paid in regular scheduled installments" § 426.5(b), App. 232a. So also to lands which become excess in consequence of the death of a spouse. § 426.5(c), App. 232a.

And as recently as May 18, 1979, the Solicitor of the Interior Department promulgated an opinion in support of those regulations (see p. 74, *supra*).

The Secretary's authority to set prices for land (if he ever had it here) having terminated when the Dis-

trict repaid 50 percent of the costs, the controversy became moot at that point as to Dr. Yellen, *et al.*, since the remedy which they sought was no longer available. "[W]hen, pending an appeal from the judgment of a lower court . . . an event occurs which renders it impossible for this court . . . to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." *American Book Company* v. *Kansas,* 193 U.S. 49, 52 (1895), quoting *Mills* v. *Green,* 159 U.S. 651, 653 (1895). *Cf. DeFunis* v. *Odegaard,* 416 U.S. 312 (1974); *North Carolina* v. *Rice,* 404 U.S. 244, 246 (1971).

If this Court determines that respondents lack standing, and decides the case on that issue without reaching the merits, we respectfully suggest that the appropriate procedure would be to vacate the order of the Court of Appeals permitting intervention (559 F.2d, at 543 (1973)) and the decisions of the Court of Appeals on the merits (559 F.2d, at 509 (1977) and 595 F.2d, at 525 (1979)), since respondents lacked standing to appeal the judgment of the District Court against the United States, thus leaving that judgment intact as res judicata. One thing that all agree upon is that the United States did have standing in the District Court.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the appeal of Yellen, *et al.,* from the judgment of the District Court against the United States should be dismissed.

In the first alternative, if Yellen, *et al.,* are held not to have had standing to intervene to appeal from the

District Court's judgment against the United States, the judgment of the Circuit Court should be vacated and the order permitting intervention to appeal should be vacated.

In the second alternative, if the case has become moot while on appeal, in consequence of the payment of over one-half of the construction charges, terminating the Secretary's power to fix land prices, the judgment of the Court of Appeals should be vacated as having become moot while the case was under submission there, and the appeal should be dismissed.

Respectfully submitted,

Of Counsel:

CHARLES E. CORKER
4128 55th Avenue, N.E.
Seattle, Washington
98105
(206) 523-9264

REGINALD L. KNOX, JR.
HORTON, KNOX, CARTER
& FOOTE
Law Building, Suite 101
895 Broadway
El Centro, California
92243
(714) 352-2821

NORTHCUTT ELY
FREDERICK H. RITTS
ROBERT F. PIETROWSKI, JR.
WILLIAM H. BURCHETTE
RALPH J. GILLIS
LAW OFFICES OF
NORTHCUTT ELY
Watergate 600 Building
Washington, D.C. 20037
(202) 342-0800

Attorneys for Imperial Irrigation District

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